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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CARSTENS PACKING COMPANY, a Corporation,  
Plaintiff in Error,

vs.

LOUIS GODO,

Defendant in Error.

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Transcript of Record.


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Upon Writ of Error to the United States District Court of the  
Western District of Washington, Southern Division.

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**FILED**

APR 11 1913



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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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# INDEX OF PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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### **Names and Addresses of Attorneys.**

JOHN D. FLETCHER, Esquire, Fidelity Building, Tacoma, Washington; and

ROBERT E. EVANS, Esquire, Fidelity Building, Tacoma, Washington,

Attorneys for Defendant and Plaintiff in Error.

GOVNOR TEATS, Esquire, Bernice Building, Tacoma, Washington;

HUGO METZLER, Esquire, Bernice Building, Tacoma, Washington; and

LEO TEATS, Esquire, Bernice Building, Tacoma, Washington,

Attorneys for Plaintiff and Defendant in Error.

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(Caption.)

### **Praeceptum for Transcript.**

To the Clerk of the Above-entitled Court:

Please prepare transcript of the following papers in the above-entitled cause, said transcript to be printed according to the rules of the Circuit Court of Appeals:

1. Complaint;
2. Answer;
3. Reply;
4. Deposition of S. P. Byars;
5. Supplemental complaint;
6. Motion to strike supplemental complaint;
7. Answer to supplemental complaint;
8. Defendant's requested instructions;
9. Verdict;

10. Petition for new trial; order denying petition for new trial;
11. Judgment;
12. Order granting stay of execution;
13. Petition for appeal;
14. Order allowing appeal;
15. Assignments of error;
16. Bond on appeal;
17. Bill of exceptions and order settling same.

Dated January 29th, 1913.

FLETCHER & EVANS,

Attorneys for Defendant and Plaintiff in Error.

[1\*]

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(Caption.)

**Stipulation [Re Printing Record].**

It is hereby stipulated between the plaintiff in error and the defendant in error in the above-entitled cause that the clerk of the above-named court shall eliminate, in printing the record sent by the trial court to him the following: All captions and verifications to all papers, except those to the complaint, and in lieu of such omitted caption and verification simply print the word "caption" and the word "verification." Said clerk shall also omit in printing said record all file-marks and admissions and proof of return or service.

FLETCHER & EVANS,

Attorneys for Plaintiff in Error.

TEATS, METZLER & TEATS,

Attorneys for Defendant in Error. [2]

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\*Page-number appearing at foot of page of original certified Record.



*In the United States Circuit Court, District of Western Washington, Western Division.*

LOUIS GODO,

Plaintiff,

vs.

CARSTENS PACKING COMPANY, a Corporation,  
tion,

Defendant.

**Complaint.**

Plaintiff complaining of defendant says:

**I.**

That the plaintiff is a citizen of the State of Washington, residing at Tacoma, Pierce County.

That the defendant, Carstens Packing Company, is at this time, and always was at all times herein mentioned, a corporation, organized and existing under the laws of the State of Maine, owning and operating a meat packing-house on the tide-flats near the city of Tacoma.

**II.**

That on the 27th day of May, 1911, and for some time prior thereto, plaintiff was in the employ of the defendant as a carpenter or millwright, under the defendant's master mechanic, Peter V. Cornils, doing such work as ordered by the said master mechanic in and about the plant of the defendant company.

**III.**

That in the construction of the elevator there was made and provided in the partition just north of the elevator-well a shaft leading from the floor of the wool-pulling house out through the different stories,

through which the counter-weight [3] of the elevator was made to run, and that for a long time before the accident to the plaintiff the counter-weight was allowed and permitted to go down through said shaft only to the floor, and there was a space below the floor and between the floor and the ground, a distance of about four feet, which was open, and through which the plaintiff and other men would pass when necessary, in their work about that part of the plant. That some time before the accident to the plaintiff, the cable or wire rope which was attached to the counter-weight broke and was replaced by a new wire rope or cable, and in attaching the counter-weight to the said cable or wire rope the said defendant carelessly and negligently attached the said weight to the said cable or wire rope, so that the said weight passed down through the floor and to within about five inches of the ground sill, and through the space where the plaintiff and other workmen were in the habit and were required to pass in their work in that part of the plant, so that in case a workman was passing through said space, and the counter-weight should go down, it would be dangerous to the man, in this, that it would catch him and crush him. All of which was unknown to the plaintiff at the time of the accident, or at all up to the time of being caught by said counter-weight, as hereinafter complained of.

#### IV.

That on the 27th day of May, 1911, it was necessary for the plaintiff to go under the building and under the ground floor of the wool-pulling house, and to pass out under the wharf in order to make certain

measurements at that place for the purpose of instilling a large vat. That the said master mechanic, Peter V. Cornils, knowing of the danger to the [4] plaintiff in passing through said space where the said counter-weight ran, and knowing that the said counter-weight would not stop at the floor, as it used to do, and knowing that the said counter-weight would pass down through the floor and through said space, carelessly and negligently failed to warn the plaintiff of that danger, and carelessly and negligently ordered and instructed plaintiff under the said building, and to go under the wharf to make the said measurements, and the plaintiff, in obedience to the orders and directions of the said master mechanic, proceeded on his way to and when he had reached the said space where the said counter-weight went down through the floor, and not knowing that the said counter-weight would come down, and not knowing of the dangers awaiting him, and without fault on his part, the said counter-weight that was so negligently and carelessly constructed, came down through the floor, catching the plaintiff on the back, at about the clavicles, breaking four ribs at the back, at the center of the same and at the stirnum, and spraining and bruising the plaintiff's foot so that the plaintiff is maimed and injured for life.

#### V.

That the plaintiff is a carpenter by trade, earning and able to earn, before the accident, four dollars (\$4) per day, when working at carpentry, and ninety-two dollars (\$92.00) per month while working as millwright for the defendant company, but the

plaintiff has been unable to work at all since the accident and will be unable to work for a long time, due and owing to the injuries so received.

That the plaintiff was fifty-three years old at the time of the accident, and that he has suffered intense [5] pain and mental anguish from the injuries so received.

That plaintiff is damaged by reason of the injuries so received through the negligence of the said defendant in the sum of Five Thousand Dollars (\$5,000.00).

WHEREFORE plaintiff prays judgment against the defendant in the sum of Five Thousand Dollars (\$5,000.00), together with costs and disbursements herein.

TEATS, METZLER & TEATS,  
Attorneys for Plaintiff.

State of Washington,  
County of Pierce,—ss.

Louis Godo, being first duly sworn on oath, deposes and says: That he is the plaintiff in the above-entitled cause, and that he has read the foregoing complaint, and that all the matters and things therein are true.

LOUIS GODO.

Subscribed and sworn to before me this 10 day of Aug., 1911.

[Notarial Seal] HUGO METZLER,  
Notary Public in and for the State of Washington,  
Residing at Tacoma.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Aug. 11, 1911. Saml. D. Bridges, Clerk." [6]

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(Caption.)

**Answer.**

Defendant answering plaintiff's complaint says:

I.

It admits the allegations contained in paragraph I of plaintiff's complaint.

II.

It admits the allegations contained in paragraph II of plaintiff's complaint.

III.

Answering the allegations contained in paragraph III of said complaint, it admits that just north of the elevator-well in the wool-pulling house is a shaft through which the counter-weight of the elevator operation between tongued uprights up and down which said counter-weight runs. It denies that said counter-weight at any time only operated to the floor of the wool-pulling house, but alleges the fact to be that the same, prior to about one year from this date, operated below the floor for a distance of about three to four feet, leaving a small space between it when down and the mud below, the tongued uprights, however, up and down which said counter-weight operated, extending all the way down to the mud. It denies that the distance between the floor of the building and the ground or mud below is only about four feet, and alleges the fact to be that such distance was about seven feet; in other words, the



floor of the building was about seven feet high above the ground or mud. It denies that the plaintiff or other [7] men or anyone passed on the ground or mud under said counter-weight, or through the space below said counter-weight, and denies that there was at any time or at all any necessity, occasion or duty for the plaintiff or anyone else to pass under such counter-weight or through the space below the same. It denies that the wire, rope or cable attached to the counter-weight was repaired or renewed, and alleges the fact to be that said cable, about a year prior to this date, broke near the weight, and that it was then readjusted by simply taking one wind from around the drum and reattaching the same to the counter-weight, thus lengthening the same about three feet, and when thus lengthened it extended a little nearer to the ground or mud than formerly, and in this condition the same has ever since been and still is being operated. It denies that there was any carelessness or negligence whatsoever in attaching or readjusting said cable to said counter-weight, and alleges that the same was carefully and properly attached and readjusted and done in the usual and obvious manner as a part of the operations of said elevator. It denies that the space through which said counter-weight operates was a passageway or any other way of travel or passage, and denies that the plaintiff or other workmen or anyone were ever in the habit or ever required to pass through said space, or that there was ever any occasion for their so doing, and denies that anyone at any time ever passed through said space or that there was at any

time any work requiring anyone whatsoever to pass through the same. It denies that the plaintiff did not have knowledge of the matters and things charged and alleged in paragraph III of his complaint, but alleges that at all times [8] the plaintiff had full and complete knowledge of all the matters and things charged and alleged in said paragraph. And plaintiff specifically denies each and every allegation, matter and thing contained and set forth in paragraph III of plaintiff's complaint, except as in this paragraph admitted.

#### IV.

Answering the allegations contained in paragraph IV of plaintiff's complaint, it denies that on the 27th day of May, 1911, it was necessary for the plaintiff to go under the building or under the ground floor of the wool-pulling house, or to pass out under the wharf, and denies that at said time there was any work for the plaintiff to do either under said building or under said wharf, or that there was any occasion or reason for plaintiff to go under either of the same, and denies that at said time or at any other time it was necessary for the plaintiff to go under the wharf, and denies that the plaintiff could go under the wharf from under said building, and denies that there was any way to get under the wharf from under the building, and denies that there were any measurements for the plaintiff or anyone to make from under said wharf, and alleges the fact to be that the vat was to be let into the wharf outside of and adjoining the building, and not under it, and the measurements were to be made therefor

and could only be made therefor from outside of the building, and above the wharf, and not under the building or wharf. It denies that Peter V. Cornils or anyone had any knowledge that the plaintiff had any thought or idea of going under said house or through said space through which the counter-weight operated, but on the contrary, said Cornils knew that the work to be done by plaintiff was on the wharf outside of and [9] adjoining said building, and knew that the work could not be done by going under said building, all of which plaintiff likewise knew or by the least thought or observation should have known. It denies that there was any reason or occasion to give the plaintiff any warning regarding the things complained of. It denies that said Cornils or anyone ordered, directed or instructed the plaintiff under said building or under the wharf, or to go under either of the same or to make the measurements for said vat in any way or manner other than measuring the space for the same in the open air and adjoining said building and outside of the same, and on top of the wharf, and denies that anyone knew or had any information or thought that the plaintiff intended or expected to go under said building or to attempt to go under said wharf, and denies that plaintiff, in doing the things that he alleges he did do in going under said building and attempting to pass through the space within which said counter-weight operated, was acting under the orders, instructions or directions of said Cornils or anyone, and alleges that if plaintiff did do or attempt to do the things that he alleges, that the same were

contrary to the orders, directions and instructions given him, and the same were done by him upon his own volition. It denies that plaintiff did not then or for many months prior know that said counter-weight came practically down to the ground or mud, and denies that plaintiff was not fully acquainted with the dangers of attempting to pass under said counter-weight, and denies that plaintiff's attempted passing beneath said counter-weight was without fault on his part, and denies that said counter-weight was carelessly or negligently constructed, or constructed in any way or manner [10] other than in the usual, customary and obvious manner of construction. It denies that it has any knowledge or information sufficient to form a belief as to whether or not plaintiff attempted to pass beneath said counter-weight or as to whether or not said counter-weight caught plaintiff on the back, or otherwise, or at all, or whether or not the same caused plaintiff the injuries complained of or at all; it, however, admits that plaintiff, at the time in question, suffered an injury, but in a way and manner unknown to the defendant, and denies that the plaintiff is maimed and injured for life or maimed and injured in any other way or manner than in a slight degree,

Except as to the matters in paragraph IV of plaintiff's complaint either admitted by defendant or denied on information and belief, defendant denies specifically each and every allegation, matter and thing contained and set forth in paragraph IV of plaintiff's complaint.



## V.

Answering the allegations contained in paragraph V, the defendant admits that plaintiff is a carpenter by trade, able to earn the sum of \$92.00 per month, and is fifty-two years of age, but specifically denies each and every other allegation, matter and thing contained and set forth in said paragraph. [11]

FOR A FIRST AFFIRMATIVE DEFENSE, defendant alleges as follows:

That whatever injuries plaintiff received were occasioned to him by his own negligence, and without negligence on the part of the defendant.

That plaintiff is a carpenter of long experience; had been working in defendant's plant for many years, and assisted in constructing the wharf referred to in his complaint. That the wharf is built over the mud on the tide-flats and about four feet high from it. That the wool-pulling house referred to in plaintiff's complaint is built over the wharf and about three feet above it. That the wharf extends just under the building, leaving an open space under the building of above seven feet from the floor of the building down to the mud. That the counter-weight referred to in plaintiff's complaint operates near the side of the building, running on two tongued uprights, which extend from the mud up through the building, leaving a space of about four feet between said uprights. That on each side of these uprights is a space of about fourteen inches wide, extending from the mud up to the floor of the building; that beyond the counter-weights the space under the entire building is open, the building being about seven



feet high above the mud, and all of this space, except that in which the counter-weight operates, is open and accessible to anyone going under the building.

That the counter-weight operates up and down in its fixed space and between the tongued uprights which run from the ground up through the building. That the side of the building where the vat alleged in plaintiff's complaint was to be placed, the same to be outside of the building and let [12] down into the wharf, extends to the mudsills below, and there is no opening from under the building to under the wharf, and it was and is impossible for anyone to go under the wharf, from under the building.

That about one year prior hereto, the cable attached to the counter-weight broke near the weight, and the same was then readjusted by taking a wind of the cable from around the drum and reattaching the cable to the counter-weight, thus lengthening the cable to a slight extent, approximately three feet, and allowing the weight to reach near the mud when the elevator was at the top of the building, and the same has been so operated ever since, and approximately a year prior hereto. That for many years prior to said last-mentioned time said counter-weight came to about three feet above the mud and about four feet below the floor of the building, but the tongued uprights up and down which the counter-weight travels have always extended to the mud, and said counter-weight has always operated up and down this fixed space.

That for several days just prior to plaintiff's injury he had been working near said counter-weight under the building, and had full knowledge of the operations of said counter-weight, and full knowledge of the conditions under said building, and full knowledge of all the matters and things hereinabove in this defense alleged.

That prior to the date of plaintiff's injury plaintiff had completed his work under said building, and that on that day plaintiff was directed by Peter V. Cornils, acting for defendant, to make certain measurements of a vat to be let into the wharf outside of and adjoining said building, and to measure the same from the outside of the building and [13] along the top of the wharf, and to tear up a plank in the wharf in order to find the supporting timber below to which the measurements was to extend. That defendant or anyone had no idea or thought that plaintiff would attempt to make such measurement by going under the building and thence under the wharf. That it was and is impossible to get under the wharf from under the building, or in any other way, or to make said measurements in that manner.

That unknown to the defendant plaintiff, after receiving directions to make said measurements as aforesaid, for some reason of his own, and entirely voluntarily and without any order or direction so to do, or any reason, necessity or occasion so to do, went under said building, but for what purpose defendant does not know, and in some manner received the injury he complained of, but how and in what

manner defendant has no knowledge, but alleges that the same was not received in any work or employment of plaintiff.

That on each side of the space in which said counter-weight operates under said building there is a space of about seven feet high and fourteen inches wide, through which plaintiff or anyone could, if occasion required it, pass with safety. That beyond said counter-weight, the entire space under said building, about seven feet high, is entirely open, anywhere, in which plaintiff or anyone, if occasion required it could pass in absolute safety. That there was at the time of plaintiff's injury and at all times during the daylight, a good light under said building as the sides of said building are open for about three feet above the wharf, and all said space under said building, and said counter-weight have good light for the same and the same are open and obvious to anyone under said building. [14]

That by reason of the matters and things hereinabove in this defense set forth, the plaintiff, if he was injured as he claims he was by attempting to pass under said counter-weight, received his injury through his own fault and negligence, and without any fault or negligence on the part of the defendant.

FOR A SECOND AFFIRMATIVE DEFENSE defendant alleges:

That all of the conditions and surroundings under said building alleged in plaintiff's complaint and the operations of said counter-weight were and are open and obvious, and are the usual and customary condi-

tions, surroundings, operations and constructions; that there were and are no latent or concealed defects or dangers; that all such surroundings, operations, dangers and risk of injury were and are open and known to the plaintiff at the time of his injury, and for many months prior thereto, and whatever dangers or risks of injury there were, the same were only such as are necessary and usual in such construction and operation, and were at all times understood and assumed by the plaintiff, and whatever injury there was occasioned to him was occasioned to him through dangers and risks of injury known to and assumed by him.

WHEREFORE defendant having fully answered plaintiff's complaint, prays that plaintiff take nothing by this action, but that the same be dismissed and that the defendant recover judgment against the plaintiff for its costs and disbursements herein.

FLETCHER & EVANS,

Attorneys for Defendant.

Office & P. O. Address: 909 Fidelity Bldg., Tacoma,  
Pierce County, Wash.

(Verification.) [15]

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(Caption.)

**Reply.**

Now comes the above-named plaintiff and replying to the affirmative defenses set forth in defendant's answer says:

**I.**

That the plaintiff denies each and every allegation set forth in the first affirmative defense in de-

fendant's answer inconsistent with the allegations of the plaintiff's complaint.

II.

That the plaintiff denies each and every allegation set forth in the second affirmative defense in defendant's answer inconsistent with the allegations of the plaintiff's complaint.

TEATS, METZLER & TEATS,  
Attorneys for Plaintiff.

(Verification.) [16]

---

(Caption.)

**Deposition of S. P. Byars, a Witness on the Part of  
the Plaintiff.**

THIS IS TO CERTIFY that on the 10th day of October, 1912, there appeared before me, Leo Teats, a notary public in and for the State of Washington, at 510 Bernice Bldg., Tacoma, at the hour of 2 o'clock P. M. of said day, Hugo Metzler, one of the attorneys for the plaintiff herein, and John Fletcher, one of the defendant attorneys, for the purpose of taking the deposition of S. P. Byars, who is at the present time in Tacoma, Washington, and about to leave the State. Said deposition being taken in the above-entitled cause pursuant to a stipulation duly entered into by the attorneys for the respective parties herein. The original stipulation being on file with the clerk of the above-entitled court. That at the hour of 2 o'clock P. M. this 10th day of October, 1912, S. P. Byars was sworn by me under oath to tell the truth, the whole truth and nothing but the



(Deposition of S. P. Byars.)

truth, and the taking of said deposition was commenced and proceeded to the close without adjournment as follows: [17]

S. P. BYARS, witness on the part of the plaintiff, being first sworn, testifies as follows:

Direct Examination.

(By Mr. METZLER.)

Q. What is your name? A. S. P. Byars.

Q. Where do you live?

A. 1102 No. Prospect Street.

Q. Are you expecting to leave the State of Washington? A. Yes.

Q. Where are you going?

A. Edmonton, Alberta.

Q. You expect to be gone throughout this month and next? A. Yes, sir, that time and longer.

Q. Are you familiar with the counter-weight that operated the elevator? A. Yes.

Q. The one where Mr. Godo was injured?

A. Yes.

Q. Did you assist in repairing the counter-weight cable prior to the time Godo was injured?

A. Yes.

Q. Do you know when Godo was injured?

A. I know the time but I can't recall the date.

Q. How long before Godo was injured did you repair the cable? A. It was six or eight days.

Q. After you had repaired the cable, did you notice how far the counter-weight stopped above the ground and mud? A. Yes.

Q. How much space was there between the ground

(Deposition of S. P. Byars.)

and the counter-weight when the counter-weight was clear down after you made the repair?

A. I would say five or six inches. [18]

Q. What position did you hold there at the time of repairing the cable?

A. I was millwright at that time.

Q. Under whose orders did you repair the cable?

A. Mr. Cornils'.

Q. What position did Cornils hold at that time?

A. He was master mechanic.

Q. Do you know what position Godo had?

A. Carpenter.

Q. Under whose orders was Godo working?

A. That I couldn't say.

Q. Was Mr. Cornils present when you made the repair on the cable? A. No.

Q. Did you consult him as to what alterations you were making? A. Yes.

Q. Did you take off one of the winds from the drum? A. Yes.

Q. Did Mr. Cornils know the method in which you repaired the cable? A. Yes.

Cross-examination.

(By Mr. FLETCHER.)

Q. There wasn't anything the matter with the cable or counter-weight, except the cable broke?

A. That's all.

Q. Where was this break relative to the place where the cable was attached to the counter-weight?

A. Direct, next the counter-weight.

A. There is an eye-bolt in the counter-weight and

(Deposition of S. P. Byars.)

cable is fastened in the eye-bolt and it broke right in the eye-bolt.

Q. And the repairs you speak of consisted in taking a wind of the cable from around the drum and reattaching the cable to the eye-bolt? [19]

A. Yes.

Q. You think this was about six or eight days before Godo was hurt? A. Yes.

Q. Have you anything by which you can fix that time? A. Nothing except memory.

Q. How long were you fixing the counter-weight?

A. I think a little over a day.

Q. Who told you to fix it? A. Mr. Cornil.

Q. Who, if anybody, assisted you?

A. Yes, Mr. McArthur.

Q. Where is Mr. McArthur now?

A. That I couldn't tell.

Q. Can you give me his first name and where he lives?

A. I couldn't tell you the number of his house, but he lives in McKinley Park. His first name is Bill.

Q. Is he also a millwright?

A. He was at that time.

Q. Where did you go in fixing the counter-weight, you and McArthur?

A. He went down on the ground where the counter-weight was.

Q. Was the counter-weight still in the groove up and down which it operated?

A. I think about two and the rest were sunk in the ground.

(Deposition of S. P. Byars.)

Q. Where was Louis Godo when you were fixing the counter-weight?     A. That I couldn't say.

Q. Do you know whether or not he knew that you had fixed the counter-weight?

A. Yes, he knew that I was working at it.

Q. Did you ever see Godo under the building near where the counter-weight operated?     [20]

A. You mean at any time?

Q. Yes.     A. Yes.

Q. How many times?     A. I could not say.

Q. More than once?     A. Yes.

Q. Do you recollect when was the last time before he got hurt seeing him or knowing that he was under the building?

A. I am sure it was two years before this time.

Q. How long before Godo got hurt were you working for the defendant?     A. About six years.

Q. You are not working for defendant now?

A. No.

Q. When did you leave the defendant's employ?

A. Sometime last February.

Q. Why was it you left the defendant's employ?

A. It was more on account of my partner than anything else.

Q. Who is the partner you refer to?

A. McArthur.

Q. The fact is, you were discharged by the defendant?

A. No, I don't think so. I think I quit myself.

Q. Why is it you think you quit yourself and were not discharged?

(Deposition of S. P. Byars.)

A. I quit because my partner was discharged and I *was sympathy* for him.

Q. Isn't it a fact that you and your partner got drunk and Mr. Cornil fired your partner on that account? A. No, it is not a fact that I got drunk.

Q. How about your partner?

A. He was not drunk either; both drinking some, but not drunk. [21]

Q. Where were you when Godo got hurt?

A. I think I was in the main building; that would be the killing-house.

Q. Did you assist Godo after he was hurt?

A. Nothing more; only I think I helped putting him in the ambulance.

Redirect Examination.

(By HUGO METZLER.)

Q. How much of the original cable was destroyed when you made the repair? That is, about how many inches in length?

A. I would judge about 10 or 12 inches.

S. P. BYARS.

(Verification.) [22]

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(Caption.)

### **Supplemental Complaint.**

And now comes the plaintiff, Louis Godo, and after first having obtained permission of the Court to file this, his supplemental complaint herein, states:

#### **I.**

That the original complaint herein was drawn on



or about the 10th day of August, 1911. That the plaintiff was injured on the 27th day of May, 1911, and while seriously injured as set forth in his complaint and maimed and injured for life, the plaintiff herein did not believe but that in the course of a year he would be able to do some sort of light work. That at the time of making and filing his original complaint herein, the plaintiff herein was suffering from injuries to his back in the lumbar regions, but the plaintiff herein was in hopes and thought and believed that the injury to his back was not so permanent as to totally disable him from work, but at this time the plaintiff alleges and says to the Court that fifteen (15) months have elapsed since the making and filing of his complaint. That the plaintiff at this time is in no better condition than he was at the time of the filing of his complaint.

## II.

That the injury to his foot and back are such that the plaintiff has been unable to work at all since the accident except on two (2) certain occasions, which the plaintiff undertook to work at light work, but which the plaintiff at each occasion was required and compelled to cease work and due and owing to his injuries and his physical condition resulting from [23] the injuries received at the accident as set forth in the plaintiff's complaint.

## III.

That the injury so received the plaintiff now states to be permanent to such an extent that the plaintiff will not be able to work at his trade at all for the balance of his lifetime. That the plaintiff is dam-

aged by reason of the injuries so received through the negligence of the defendant in the sum of Ten Thousand (\$10,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of Ten Thousand (\$10,000.00) Dollars, together with his costs and disbursements herein.

TEATS, METZLER & TEATS,  
Attorneys for Plaintiff.

(Verification.) [24]

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(Caption.)

**Motion to Strike Supplemental Complaint.**

Comes now the defendant by its attorneys, Fletcher & Evans, and moves the Court for an order striking from the files herein the supplemental complaint filed on this date, for the following reasons:

First: It moves to strike the first and second paragraphs thereof because the same are merely argumentative and a pleading of evidence.

Second: For the reason that said complaint is not in proper form, and amendment should be by amended complaint.

Third: That the application for leave to amend was not made until the calling of this case for trial. That the supplemental complaint sets out an *addition* and further injury than the original complaint, of which defendant was not advised when it answered herein and prepared its defense.

FLETCHER & EVANS,  
Attorneys for Defendant. [25]

(Caption.)

**Answer to Supplemental Complaint.**

Comes now the defendant and for answer to the supplemental complaint filed herein, and without waiving its objections thereto and motion to strike the same, alleges and says:

I.

Referring to paragraph I of said supplemental complaint, defendant has no knowledge or information sufficient to form a belief as to the same, and therefore denies the same.

II.

Defendant denies the allegations contained in paragraphs II and III of said supplemental complaint.

FLETCHER & EVANS,  
Attorneys for Defendant.

(Verification.) [26]

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(Caption.)

**Defendant's Requests for Instructions.**

You are instructed to return a verdict in this cause in favor of the defendant.

If the instruction for directed verdict in favor of defendant is refused, then defendant, saving an exception to such refusal and without waiving the same, requests the Court to instruct the jury as follows:

No. 1.

In this case the plaintiff seeks to recover damages against the defendant. Plaintiff claims that defendant failed to perform its duty to him on account of

which he received an injury.

He bases his right to a recovery on the ground that the defendant had allowed the counter-weight to the elevator formerly to stop at the floor of the building, but that some time before the day of his injury a new cable was attached to the counter-weight which allowed the counter-weight to pass below the floor of the building down to about five inches of the ground. That from the floor of the building to the ground was a space of about four feet in height; that the workmen in defendant's employ were in the habit and in the performance of their work were required to pass under this counter-weight; that he did not know of the change in regard to the counter-weight coming down near to the ground.

That on May 27, 1911, it was necessary for him to go under the building in order to get under the wharf to make measurements for a vat. That Mr. Cornils was his boss and knew of the danger in passing under the counter-weight and [27] knew of the change in the operation of the counter-weight but did not warn him, but, on the contrary, ordered and instructed him to go under the building and thence under the wharf to make the measurements, and that he in obedience to such order went under the building, and as he was passing under the counter-weight it came down and caught him producing his injury.

There is no evidence that the elevator or the counter-weight were in themselves defective or improperly operated, or that it was wrong in itself to have the counter-weight come down to the ground. The charge is that it did not formerly come below the

floor, and that some time before plaintiff's injury it was changed and allowed to do so. That under the counter-weight was a passageway for the workmen and that at the time of his injury he was specifically ordered by his boss, whom he claims knew of the change in the operation of the counter-weight, to go under the building without telling him of this change, and that in the performance of his duties he went under the counter-weight in ignorance of the change and was hurt.

The defendant has answered, and for its defense states that the counter-weight operated along tongued uprights which extended all the way to the ground and up through the building. That this building is built over the tide-flats and about three feet above the wharf; that the wharf is about four feet above the ground and extends just under the building, leaving an open space of about seven feet from the ground to the floor of the building. That the space between which the counter-weight operates, is about four feet wide, and is near the side of the building. That [28] on each side of it is a small space about fourteen inches wide. That all the rest of the space under the building is open and safe for one to walk about, and about seven feet high above the ground. That prior to an accident, about the 21 day of January, 1911, the cable on the counter-weight allowed the counter-weight to come to about four feet below the floor of the building, or about three feet from the ground. That about that time the cable broke near the counter-weight; that wind of the cable was taken from around the drum and reattached to



the counter-weight which lengthened the cable about three feet so that from that time the counter-weight came down when the elevator went to the top, to almost the ground. That this was the condition at all times from then until plaintiff was injured.

Defendant further claims that plaintiff is an experienced carpenter and had been in its employ for many years, and helped build the wharf in question. That the side of the building where the vat was to be placed extends all the way down to the mudsill, and there was no way to get under this part of the wharf by going under the building. That for some days before plaintiff's injury he had worked under the building near the counter-weight, and knew where it was located and how it operated, and knew that all the space under the building except where the counter-weight came down, and the two small spaces on each side was open, so that one could go in safety wherever he pleased under the building, except under the counter-weight.

Before the day of plaintiff's injury he had finished his work under the building and there was no occasion or duty requiring him to then go under the building. That on [29] the day in question defendant wanted a vat let into the wharf just outside of and adjoining the building, and wanted the space measured for a vat, and Mr. Cornils directed the plaintiff to make these measurements and took him to the place outside of the building where the measurements were to be made, and directed him to tear up the plank in the wharf in order to find the supporting timber to which the measurement was to be made.

That plaintiff had no duty or occasion to then go under the building, and that the defendant or its employees did not know that plaintiff intended to go under the building, and without defendant's knowledge or the knowledge of its employees the plaintiff, for some reason of his own, went under the building and received an injury in some manner unknown to the defendant.

That on each side of the counter-weight is an open space of seven feet high and fifteen inches wide; that other than this space and the counter-weight space the entire underpart of the building is open and safe for walking about in and about seven feet high from the ground. That the building is about three feet above the wharf and the wharf extends just under the side and end of the building, leaving the space under the building with light sufficient for anyone to see and observe the conditions under the building, and to see and observe the counter-weight space, and the other spaces, and that if plaintiff was injured by the counter-weight coming down upon him, it was, for these reasons, his own and not the defendant's fault.

The defendant also claims that the conditions and surroundings under the building and the space in which the counter-weight operated were all open and observable, and were [30] the usual and customary conditions, construction and operation; that there were no hidden dangers; that plaintiff knew, or by the use of his eyes and faculties could have known, of the conditions and the operations of the counter-weight and of the dangers of passing

under the counter-weight, and that these open and apparent conditions and operations and dangers were assumed by the plaintiff when he entered defendant's employ, and for that reason he cannot hold the defendant responsible for his injury.

No. 2.

If an employee gets injured while doing something his duty does not require him to do, and he has no order to do, and the same is not done in the performance of his required employment, he has no right to hold his employer responsible for his injury, and if in this case the plaintiff had no occasion to go under the building and was not directed to go under the building, and his employment at that time did not require him to go under the building, then he cannot recover in this action, and your verdict must be for the defendant. [31]

No. 3.

If you find that the construction under the building and the operations of the counter-weight were the usual constructions and operations, and the same were all open and obvious, then though the plaintiff had some duty requiring him to go under the building, and those directing him did not warn him of the operations of the counter-weight, still if he knew the conditions and the operations of the counter-weight, or if the same were open and apparent so that they were observable to ordinarily careful persons, then the plaintiff could not recover, for the law does not require an employer to warn an employee of conditions, operations or dangers when the same are known to the employee or can, by

ordinary use of his eyes and faculties be observed by him. [32]

## No. 4.

If you find that the space under the building was open and afforded safe passage, except the space occupied by the counter-weight, and though you should find that the plaintiff's duty required him to go under the building, yet if you further find that, for some reason of his own, he went under the counter-weight knowing that it was above him or by the use of his eyes could have known that it was above him, instead of his using the open space under the building which afforded safe passage, he cannot hold the defendant responsible for his voluntarily using the unsafe way. [33]

## No. 5.

An employer, when he has in his employ a man of experience and mature judgment, does not have to warn or instruct such employee about the usual operations of a factory, or open and ordinary dangers attendant upon such operations, when the same are open and obvious to such employee. For it is presumed that an employee of experience and mature judgment will observe these things for himself, and as a matter of law in doing his work he is held to assume these ordinary and usual risks and dangers, and if he receives an injury from operations that are usual, customary, open and obvious, he cannot complain, and if in this case the operations of the counter-weight were usual and customary, in the work of this kind, and were open and obvious, and no duty requiring plaintiff to place himself in a



place of danger under the counter-weight, and if the way under the counter-weight was not a used way, and the entire balance of the space under the building was open and safe and plaintiff knew of these conditions, or by the use of his faculties should have known them, he cannot recover in this action but your verdict must be for the defendant. [34]

No. 6.

Plaintiff does not claim in his evidence that the construction of the building was unsafe or the construction and operations of the counter-weight were unsafe, but his claim is that the counter-weight formerly only came to the floor of the building, and that some time before his injury the cable had been lengthened so that the counter-weight came below the floor and down to near the ground, and that he did not know about this change. He further claims that the way under this counter-weight was a used passageway for the employees in defendant's plant. Now, if you find that this change had been made about ——— months before plaintiff's injury and that after the change he had worked under the building near the counter-weight, then the defendant had a right to believe that the plaintiff had used his eyes and had observed the operations of the counter-weight and the conditions under the building, and that though you should find that Mr. Cornils directed the plaintiff to go under the building at the time of his injury, yet neither Mr. Cornils nor the defendant could be charged with a failure of duty in not warning the plaintiff of the operations of the counter-weight, for an employee does not have to be warned



of dangers known to him or which he has had reasonable opportunity to observe. And if you should find that the way under the counter-weight was not a used way, and that the balance of the space under the building was open and safe, then neither the defendant nor Mr. Cornils could be charged with knowledge that the plaintiff was going under the counter-weight, but would have a right to presume that plaintiff would use his eyes and would take the safe course under the other part of the building.

[35]

No. 7.

If you find from the evidence that the vat was to be installed outside of the building, and that the measurements for it were to be made outside the building, and that Mr. Cornils, who was directing the plaintiff in his employment, knew that one could not get under the wharf to make the measurements by going under the building, then neither the defendant nor Mr. Cornils could be charged with knowledge that plaintiff was going to attempt to make the measurements by going under the building.

And even if you should find that Mr. Cornils knew that plaintiff was going under the building to make the measurements, still the defendant would not be liable unless you further find that the plaintiff did not know of the operations of the counter-weight or by the use of his eyes in his former work under the building could not reasonably have observed its operation. And even in this case, if you should find that the way under the counter-weight was not a used

way and that the balance of the space under the building was open and safe, and that the plaintiff voluntarily used an unsafe way without the knowledge of the defendant or Mr. Cornils, then the defendant would not be liable. [36]

No. 8.

If you find that a vat was to be let down into the wharf outside of the building, and the measurements were to be made outside of the building, and that Mr. Cornils took plaintiff to the place outside of the building and showed the plaintiff where to make the measurements and directed him to tear up a plank in the wharf to find the supporting timber from which to make the measurements, and give him no order to go under the building, and did not know that he would attempt to make the measurements by going under the wharf from under the building, and that plaintiff, notwithstanding these directions from Mr. Cornils, if you believe he so directed the plaintiff, of his own volition went under the building because he believed he could more easily make his measurements in that way, then by the plaintiff's failure to follow the directions of Mr. Cornils and assuming to do the work in his own way, his injury would be the result of his own fault and the defendant would not be responsible therefor, and your verdict must be for the defendant. [37]

No. 9.

The Court instructs you that before the plaintiff is entitled to recover in this action he must prove all the material allegations of his complaint by a fair preponderance of the evidence. By preponderance

of evidence is meant, by the greater weight of the evidence; that is, the evidence most convincing to your minds, and in determining upon which side of the case the evidence preponderates, you should take into consideration all the facts and circumstances testified to on the trial, the apparent fairness or lack of fairness of any witness, the interest or lack of interest of any witness, and the apparent fairness or candor with which the witnesses testified, their demeanor on the witness-stand and all the facts and circumstances surrounding the trial, and from all the evidence and the facts and circumstances you are to determine upon which side the evidence preponderates. If the plaintiff fails to prove his case by a fair preponderance of the evidence, then your verdict must be for the defendant. [38]

## No. 10.

You are instructed that for the plaintiff to recover it is necessary for you to find that the evidence preponderates in favor of the plaintiff that his injury was caused by defendant's negligence as plaintiff has alleged it. By preponderance of evidence is meant such evidence as is more convincing to your minds, and in this case if, after hearing all the evidence your mind is not more convinced in favor of plaintiff that his injury was caused by defendant's negligence as he alleges it, that is, if your mind is left evenly balanced as to whose contention is right, then plaintiff would not be entitled to recover, but your verdict should be for the defendant. [39]

## No. 11.

You are instructed that in this case if you believe

from the evidence that the plaintiff was an experienced man in the line of work in which he was engaged on the day of his alleged injury, and was familiar with the risks and dangers incident to such work, if any such existed, and if you further find from the evidence that the injury to plaintiff occurred through the happening of an event ordinarily incident to such line of work, then the plaintiff assumed all the risk of such injury when he entered upon such employment and he cannot recover in this cause. [40]

No. 12.

You are instructed that where a servant is guilty of negligence himself, or fails to exercise ordinary care and caution, and such negligence or such failure to exercise ordinary care and caution contributed to his injury to such an extent that the accident would not have occurred but for such negligence of the servant or failure to exercise ordinary care and caution, then the servant is guilty of contributory negligence and cannot recover. [41]

No. 13.

You are instructed that if you believe from the evidence that the plaintiff in going about his work chose to go about it and chose to remain in such place as would subject him to injury, and that his acts were not those of an ordinarily careful and prudent person under the circumstances, then said plaintiff was guilty of contributory negligence and he is not entitled to recover in this case and your verdict should be for the defendant. [42]

## No. 14.

You are instructed that if you believe from the evidence in this case that there were two ways or methods of doing the work in question at the time plaintiff claims to have been injured, one of which methods was safe and the other dangerous and both were equally open and apparent to plaintiff, and that he voluntarily chose the dangerous way and was injured, then he is guilty of contributory negligence and cannot recover in this cause. [43]

## No. 15.

You are instructed that the master does not owe any duty to a servant to warn him of dangers which are open and apparent, and as readily observable by the servant as by the master, and if in this case you should find from the evidence that the counter-weight and the uprights upon which it operates were in plain view and its condition open and apparent, and the plaintiff, by the exercise of his faculties and ordinary care, could have avoided the injury from said counter-weight, then you are instructed to find a verdict for the defendant. [44]

## No. 16.

In this case there has been evidence that the men who fixed the cable after it broke laid down planks on each side of the counter-weight space to stand on, and it is argued that this constituted an invitation to Godo to use that way at the time he was injured. In regard to this matter you are instructed that unless you find that the plaintiff or its officers, or those in charge of its business, knew that the planks had been so laid, or from all the circumstances should



have known it, then the defendant would not be charged with knowledge of this situation and would not be charged with having invited the plaintiff to use this way. And though you should find against the defendant on this point, yet if you should further find that the plaintiff thoughtlessly and carelessly, and without taking the precautions that an ordinarily prudent person would take, placed himself in a known dangerous position or in a position that from the use of his eyes and faculties he should have known to be dangerous, and if it was his carelessness and negligence and failure to act as an ordinarily prudent person would have acted that caused his injury, then he cannot recover. [45]

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(Caption.)

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiff and assess his damages at the sum of SIX THOUSAND FIVE HUNDRED Dollars (\$6,500.00).

CHARLES A. BROWER,

Foreman. [46]

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(Caption.)

**Judgment.**

This cause coming on for trial before the Court and a jury on the 25th day of November, 1912,—plaintiff appearing in person and by his attorneys, Teats, Metzler & Teats, and the defendant appearing by its attorneys, Fletcher & Evans, the jury being duly impaneled, the cause proceeded with the intro-

duction of testimony from day to day, until Wednesday, the 27th day of November, 1912, when the cause was submitted to the jury for its decision; whereupon the said jury retired, and thereafter, on Friday morning, November 29th, 1912, brought into court its sealed verdict, which verdict was thereupon unsealed. Said verdict being in favor of the plaintiff and against the defendant, and assessed the plaintiff's damages in the amount of Six Thousand Five Hundred (\$6,500.00) Dollars. Thereupon said verdict was filed in said cause. And now, on this 2d day of December, 1912, on the motion of plaintiff for judgment on said verdict,—

IT IS CONSIDERED, ORDERED AND ADJUDGED that the plaintiff, Louis Godo, have and recover judgment against the said defendant, Carstens' Packing Company, a corporation, and judgment is hereby rendered in his favor and against said defendant in the sum of Six Thousand Five Hundred (\$6,500.00) Dollars, together with his costs and disbursements to be taxed according to law.

DATED THIS 3d DAY OF DECEMBER, 1912.

EDWARD E. CUSHMAN,

Judge.

To all of which judgment and the entry thereof defendant excepted and its exceptions are allowed.

[47]

Done this 4th day of December, 1912.

EDWARD E. CUSHMAN,

Judge. [48]

(Caption.)

**Petition for New Trial.**

Comes now the above-named defendant, Carstens Packing Company, and petitions this Honorable Court for a new trial of this cause and the issues herein on the following grounds, to wit:

I.

Irregularity in the proceedings of the Court, the jury and the plaintiff and the abuse of the Court's discretion by which the defendant was prevented from having a fair trial.

II.

Misconduct of the plaintiff and of the jury.

III.

Excessive damages, appearing to have been given by the jury under the influence of passion and prejudice.

IV.

Error in the assessment of the amount of the recovery by the jury in that the same is too large.

V.

Insufficiency of the evidence to justify the verdict and that the same is against law.

VI.

Errors in law occurring at the trial and excepted to at the time by the defendant, which errors materially affected the results of this cause in favor of the plaintiff and against the defendant.

VII.

That the recovery is against the great weight of the evidence. [49]

FLETCHER & EVANS,  
Attorneys for Defendant.

(Verifications.) [50]

(Caption.)

**Order Denying New Trial.**

This cause coming on for hearing on petition for new trial, filed and entered by defendant company, plaintiff appearing by his attorneys, Teats, Metzler & Teats, and the defendant appearing by its attorneys, Fletcher & Evans, and after argument of the said petition, same was submitted to the Court, and the Court finds that the same should be overruled;

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the defendant's petition for new trial be and the same is hereby overruled, to which ruling defendant excepts and exceptions allowed.

Dated this 23d day of December, 1912.

EDWARD E. CUSHMAN,  
Judge. [51]

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(Caption.)

**Order Granting Stay of Execution.**

This cause coming on duly for trial, and the jury having returned its verdict, and before the discharge of the jury the defendant having moved for a stay of execution in this cause until sixty days after the motion for new trial herein is disposed of, and the Court having announced in open court on said motion that said stay was granted—

NOW, THEREFORE, IT IS BY THE COURT ORDERED that execution in this cause be, and the same is hereby, stayed for a period of sixty days from and after the date upon which the motion for

new trial herein is disposed of, said stay being granted to allow defendant time to prepare bill of exceptions on appeal in this cause.

Done in open court this 4th day of December, 1912.

EDWARD E. CUSHMAN,

Judge. [52]

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(Caption.)

**Petition for Appeal.**

The Carstens Packing Company, the defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 3d day of December, 1912, comes now by Fletcher & Evans, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error in the Hon. United States Circuit Court of Appeals for the 9th Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the 9th Circuit.

And your petitioner will ever pray.

FLETCHER & EVANS,

Attorneys for Plaintiff in Error, Defendant in  
Lower Court.

(Verification.) [53]



At a stated term, to wit, the July term, A. D. 1912, the District Court of the United States of America, in and for the Western District of Washington, Southern Division, held court in the courtroom in the City of Tacoma and County of Pierce, in said District, on the 27 day of January, in the year of our Lord one thousand nine hundred and thirteen. Present, the Hon. EDWARD E. CUSHMAN, District Judge.

(Caption.)

**Order Allowing Appeal.**

Upon the motion of J. D. Fletcher, Esq., and Robert E. Evans, Esq., attorneys for the defendant, and upon the filing of a petition for writ of error and assignments of error,

IT IS ORDERED that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals, 9th Circuit, the judgment heretofore entered herein; and that the amount of the bond in said writ of error be and hereby is fixed at \$14,000.00; that upon the giving of such security all further proceedings in this court to be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the 9th Circuit.

EDWARD E. CUSHMAN,  
District Judge. [54]

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(Caption.)

**Assignments of Error.**

Comes now the defendant in the above-entitled

cause and files the following assignments of error upon which it will *reply* for a prosecution of the writ of error in the above-entitled cause.

First. The Court erred in denying the motion of defendant for nonsuit in this cause made at the close of the plaintiff's case in chief. Said motion being made upon the following grounds:

"1st. That the plaintiff has failed to prove a cause of action as laid in his complaint.

2nd. That there is an absolute failure of proof of any negligence on the part of the defendant.

3rd. That the accident was due to contributory negligence and want of due care and caution on the part of the plaintiff.

4th. That the condition was open and apparent and plaintiff assumed whatever risk there was."

(Defendant's motion and the Court's denial of the same appear on pages 126, 127, 128, 129.)

Second. The Court erred in permitting the trial amendment to the complaint by the filing of a supplemental complaint.

Third. The Court erred in overruling defendant's motion to strike supplemental complaint.

Fourth. The Court erred in refusing to grant defendant's first requested instruction for a directed verdict. Said requested instruction appearing in Bill of Exceptions, page 256, and being as follows:

"You are instructed to return a verdict in this cause in favor of the defendant."

Fifth. The Court erred in allowing the jury to take with them, for use in the deliberation upon their verdict, the supplemental complaint filed by the

plaintiff herein at the trial. Said direction to take supplemental complaint appearing in the first part of the Court's instruction to [55] jury found on page 234 of Bill of Exceptions, line 10.

Sixth. The Court erred in instructing the jury as follows:

“The master is under a positive duty, owes the positive duty to his employee, to provide the employee with a reasonable safe place in which to do his work. This duty being one that is positively imposed upon the master in the first instance, he will not be excused from its performance by entrusting it to another charged with the duty to make performance for him but who neglects to perform that duty, but the master is not an insurer of the lives and limbs of his employees.”

Said instruction being found on page 236 of the Bill of Exceptions, commencing with line 7. The same being excepted to by the defendant, which exception appears on page 254 of the Bill of Exceptions, commencing with line 24.

Seventh. The Court erred in instructing the jury as follows:

“The Court has instructed you that it is a duty of the master to provide the servant with a reasonably safe place in which to do the work he is employed to do. If on account of changes in the construction of the master's premises and appliances the servant's place of work ceases to be reasonably safe, and is made by the master unreasonably and unnecessarily dangerous, and the master knows of the danger or should in the exer-

cise of ordinary care in the performance of his duty know of such dangers, and the servant did not know of the changed condition and did not appreciate the danger therefrom, and could not by the exercise of reasonable diligence know such dangers, the master should give the servant such warning of the hidden dangers so created as an ordinarily careful person would give under all the circumstances to render the servant's place of work reasonably safe, and if such master negligently fails to give any warning, and such failure is the proximate cause of the servant's injury, the master is liable, unless the injury was contributed to by the servant's own negligence or want of ordinary care. If the changes made and the dangers arising therefrom are open and obvious and observable by one of the age, intelligence and experience of the servant in [56] the exercise of ordinary care for his own safety, the master would be under no duty to warn the servant, and would not be negligent in failing to warn the servant."

Which instruction is found on pages 238 and 239 of the Bill of Exceptions, commencing with line 18 on page 238. Which instruction was excepted to by defendant, said exception commencing on line 30, page 254 of the Bill of Exceptions and continuing on page 255.

Eighth. The Court erred in instructing the jury as follows:

"If you should find from the evidence that the plaintiff was instructed to make the measurements from under the wharf or building, then you are

instructed that he could proceed, unless otherwise directed by his employer or the representative of his employer, in the way and course that an ordinarily prudent and cautious person would proceed, having the opportunity for observing and the knowledge of the dangers of the place of the accident, that you find that the plaintiff had at the time of the accident, and if you find that he did proceed with his work as an ordinarily prudent and careful person would proceed under all the circumstances, then you are to find that the plaintiff was not guilty of contributory negligence.”

Said instruction being found at page 239 of the Bill of Exceptions, commencing with line 15, and the defendant’s exception thereto being found on page 255, commencing with line 30 and continuing on page 256.

Ninth. The Court erred in denying defendant’s petition for a new trial of this cause.

WHEREFORE said defendant, plaintiff in error, prays that the judgment of said court be reversed, and that said District Court be directed to enter a judgment herein in favor of the defendant and against the plaintiff, dismissing this action on his merits, or if said judgment of [57] dismissal is not proper, then that said District Court be directed to grant a new trial of this cause.

FLETCHER & EVANS,  
Attorneys for Plaintiff in Error, Defendant in Lower  
Court. [58]



(Caption.)

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, Carstens Packing Company, a corporation, as principal, and A. V. LOVE and L. L. LOVE, as sureties, are held and firmly bound unto Louis Godo, plaintiff above named, in the sum of FOURTEEN THOUSAND Dollars, to be paid to said Louis Godo, his executors or administrators, which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 29th day of January, A. D. 1913.

WHEREAS, the above-named defendant, Carstens Packing Company, has sued out a writ of error to the United States Circuit Court of Appeals for the 9th Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States for the District of Washington:

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant, Carstens Packing Company, shall prosecute said writ to effect and answer for all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

CARSTENS PACKING COMPANY,

By THO. CARSTENS,

President.

A. V. LOVE.

L. L. LOVE.

(Verification.)

The above bond and sufficiency of the sureties on the same are hereby approved this 29th day of January, A. D. 1913.

EDWARD E. CUSHMAN,  
Presiding District Judge. [59]

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[**Bill of Exceptions.**]

*In the United States District Court, Western District  
of Washington, Southern Division.*

Case No. 1850—C.

LOUIS GODO,

Plaintiff,

vs.

CARSTENS PACKING CO.,

Defendant.

BE IT REMEMBERED that heretofore and on the 25th day of November, A. D. 1912, the above-entitled cause coming regularly on for trial before the Honorable E. E. CUSHMAN, Judge of the above-entitled court, and

The plaintiff being present in person and represented by his attorneys, MESSRS. TEATS, METZLER & TEATS, and

The defendant being represented by its attorneys, MESSRS. FLETCHER & EVANS,

The following proceedings were had and done:  
[60]

Mr. TEATS.—If the Court please, we have agreed upon an amendment to the complaint, the 18th line, — page, by inserting, “And injuring the lumbar region of his back.”

The COURT.—Take the complaint and amend it on the file, and the clerk will initial it.

Mr. TEATS.—It was sometime since this action was begun, and I would like to change our prayer from five thousand to ten thousand dollars.

The COURT.—Without filing a supplemental complaint?

Mr. TEATS.—Yes.

The COURT.—Any objection?

Mr. EVANS.—We object to the amendment at this time, if the Court please.

Mr. TEATS.—It is not any part of the complaint, only the prayer.

The COURT.—The objection is sustained, without the supplemental complaint.

Mr. TEATS.—Very well. I would like to prepare the supplemental complaint then.

The COURT.—State the general facts that you will embody in the supplemental complaint so that we will know whether both parties are ready for trial.

Mr. TEATS.—I will state the facts to be, at the time this complaint was made we were expecting immediate recovery or soon recovery, in a very reasonable time. This complaint was made on the 10th day of August, 1911, and more than a year has passed and instead of any recovery the plaintiff has become worse, and his conditions are worse to-day than they were when this complaint was made up. [61\*—1†]

The COURT.—You do not intend to allege additional injuries that have manifested themselves but

\*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

simply that the recovery is not as speedy as expected.

Mr. EVANS.—He is asking for more money.

Mr. TEATS.—That is true, but we have amended by agreement, “And injuring the lumbar region of his back,” which is an injury that has come on as a part of this accident and which was not so serious before, and we passed it up at the time of making this complaint.

The COURT.—Very well, the supplemental complaint may be filed, and it will be considered denied.

Mr. EVANS.—Note an exception to the ruling of the Court in permitting the supplemental complaint at this time, for the reason the application is not timely.

The COURT.—Exception allowed.

Thereafter, and on the 25th day of November, 1912, the jury having been sworn to try the cause, the following proceedings were had:

Mr. EVANS.—If the Court please, at this time, before proceeding further, I desire to state that counsel this morning while I was in court served a supplemental complaint upon me, and I just served on him a motion to strike that supplemental complaint from the files, on the ground that it is immaterial and irrelevant and a great deal of it is not proper in any sense of the word. Yesterday he asked leave to amend the prayer of his complaint, and that was granted over our objection. [62—2]

The COURT.—You objected to the amendment to the prayer. I sustained the objection unless he made some allegation to show wherein he was in a different position now from what he was at the time he filed

his complaint, and so he filed the supplemental complaint.

Mr. EVANS.—Which complaint do we go to trial on—the original complaint or the supplemental complaint, or both?

The COURT.—You go to trial on both.

Mr. EVANS.—I would like to have the record to show my objection and exception.

The COURT.—You were given an exception. This is simply the reducing to writing of the motion made on yesterday.

Mr. EVANS.—Yes, but I think he goes stronger in this complaint than he asked yesterday.

The COURT.—Of course, the total amount of the prayer is now ten thousand dollars. It would not be ten thousand dollars on the supplemental complaint and five thousand dollars on the original. The motion denied and exception allowed.

Mr. EVANS.—I would also at this time like to have the appearance of Mr. C. F. Wilt noted as one of the attorneys for defendant.

The COURT.—Mr. Wilt's appearance will be noted.

Thereupon the plaintiff having stated to the jury the facts which he expects to prove in the trial hereof,

The following proceedings were had and done:  
[63—3]

The plaintiff, to sustain the issues upon his part, offered the following evidence:



**[Testimony of J. E. Belcher, for Plaintiff.]**

J. E. BELCHER, who being duly sworn, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. What is your name?      A. J. E. Belcher.

Q. What is your business?

A. Assistant treasurer, Carstens Packing Company.

Q. What do you do as assistant treasurer?

A. Why, look after the credits and financial transactions—the financial end of the business.

Q. Do you have anything to do with the claims?

A. I do.

Q. Do you have anything to do with the lawsuit in question?      A. I beg pardon?

Q. Do you have anything to do with this case?

A. Not particularly; no.

Q. Ain't you helping to work it up, collecting facts and records and so on?      A. Yes.

Q. You are familiar with the premises over there, are you not?      A. I am.

Q. Look at Identification "A." Can you recognize for the purpose of explanation the premises in question in this case?      A. Yes, sir.

Q. This is the old glue-house (indicating on Ident. "A"). This [64—4] is only for the purpose of explanation. I am not familiar with the measurements; I do not say that this is a correct measurement.      A. That appears to be it.

Q. The red lines here would indicate the elevator

(Testimony of J. E. Belcher.)

shaft?      A. Yes.

Q. The elevator-well?      A. Yes.

Q. And the large heavy line over here indicates the ringer?      A. Yes.

Q. And another dark line there marked "tank." Is this the tank?      A. Yes.

Q. That is the one they were installing at the time of the accident?      A. Yes.

Q. The dotted lines along here would show the platform before the new addition was put on?

A. I do not recall that platform.

Q. Have you any records to show when the foundations for the ringer was put in?      A. I think so.

Q. Can you produce them?

A. I think I can. That was approximately the early part of April.

Q. Have you got anything that would show when exactly? Do your records show?

A. No, the record I have here does not show.

Q. Have you the records of this you say?

A. They are somewhere in the office, yes.

Q. Are they not here? [65—5]      A. No, sir.

Q. What sort of records are they?

A. Well, it would be material that was purchased for that particular work and a record of the time the men put in building the form. The concrete was put in by contract work.

Q. Do you know who did the work?

A. A man by the name of Smith.

Q. I will ask you at this time to produce the record

(Testimony of J. E. Belcher.)

to show the time when the cement foundation was installed.

Mr. EVANS.—I will state for the benefit of counsel that we are perfectly willing to produce that record. It is not here. It is over at the packing-house. We certainly shall be glad to produce them.

The COURT.—You clearly understood what it is?

Mr. EVANS.—He wants the time-book, as I understand it, or whatever records they have that will show when the ringer foundation was built.

Mr. TEATS.—That is what I want.

Q. Can you tell when they commenced on the new addition to the glue-house?

A. We can tell that by our records; yes.

Q. Have you got the records here?

A. I have not.

Q. What have you got here—haven't you got the records here on that point?

Mr. EVANS.—We object to the question.

Q. You haven't them here? I noticed you were looking at a record. I did not know but what they were here. A. No, sir; I have not. [66—6]

Q. Can you state from memory when these things were done? A. No, I cannot.

Mr. EVANS.—Q. The only thing you know about that plat, is it, is illustrative; but you do not know whether it is correct or not? A. I do not know.

(Witness excused temporarily.) [67—7]

**[Testimony of Louis Godo, in His Own Behalf.]**

LOUIS GODO, the plaintiff, being called as a witness in his own behalf, testified as follows, after being duly sworn:

Direct Examination.

(By Mr. TEATS.)

Q. What is your name?      A. Louis Godo.

Q. Where do you live?

A. 112 East Wright Avenue.

Q. How old are you?

A. I will be 54 next birthday.

Q. When are you 54?      A. The 10th of May.

Q. What is your business?

A. Well, my business has been carpenter by trade.

Q. How is that?

A. I have been a carpenter by trade.

Q. When did you come to this state?

A. I came to Tacoma in '88, the 28th day of June.

Q. What have you been following since that time?

A. Carpenter work mostly, except three years I was up in the Yukon; six years I was up in the Yukon.

Q. What?      A. Up in the Yukon Territory.

Q. What years are they?

A. I went up there in 1898 and came out again in 1902.

Q. After coming back, who did you work for?

A. Carstens Packing Company, most of the time.

Q. What did you work at?

A. Carpenter work and millwrighting. [68—8]

Q. Under whom did you work?

(Testimony of Louis Godo.)

A. Under Mr. Cornils.

Q. What was he?      A. He was master mechanic.

Q. Anybody else?

A. The last year I was working there I had a foreman by the name of Charlie Lundgren.

Q. Mr. Cornils is the man sitting here (indicating in the courtroom)?      A. Yes, sir.

Q. How long did you work for him when you first went to work?

A. I don't know for sure whether it was in '92 or '93.

Q. 1902 or 3?

A. 1900, yes,—on the 11th day of October.

Q. 1902?

A. I am not positive whether it was 1902 or '3, the 11th of October.

Q. How long did you work there?

A. I worked there until 1906 in September, the first Saturday after Labor Day.

Q. During the time you were working there, was what they call the glue-house constructed?

A. No, sir; it was constructed the last summer I was there or the last winter.

Q. That is what I am asking you.

A. That was constructed the last summer.

Q. Was that built?

A. It was built before I left, yes.

Q. What year was that built in?

A. It was built in 1906, in the winter. [69—9]

Q. When did you go back to work after 1906?

A. In May, 1910.



(Testimony of Louis Godo.)

Q. What did you do then?

A. When I went to work there again?

Q. Yes.

A. Went to work at carpenter work as usual, and millwrighting.

Q. Millwrighting?

A. Millwrighting and carpenter work.

Q. Under whom did you work?

A. Well, sometimes I got my instructions from Mr. Cornils and sometimes from Charlie Lundgren.

Q. Were they still superintendent and foreman over there?     A. Yes, sir.

Q. Of what department?

A. Over all the mechanical department, building and construction.

Q. Did you say you commenced in May, 1910?

A. Yes, sir.

Q. And when did you quit?

A. I quit when I got hurt, the 27th day of May, 1911.

Q. Worked over there about a year?     A. Yes.

Q. Now, during the time you were working there, did you work around the glue-house?     A. Yes, sir.

Q. Look at Identification "A"; do you recognize that?     A. Yes.

Q. What is it?

A. That is the underground floor of the glue-house.

Q. I wish you would just explain to the jury the situation [70—10] over there before the building of the new addition.

A. I can do so. This is the line of the old building,

(Testimony of Louis Godo.)

and there is the elevator shaft (indicating on plat).

Q. The one in red is the elevator shaft?

A. And there is the platform which used to be from the building before.

Q. How wide was that platform?

A. About six feet.

Q. How high above the wharf?

A. About three feet. Not over three feet, about.

Q. What do you mean by the wharf?

A. The wharf is the platform or floor where they drive in to all around there. It is all built on piling, the whole thing, you may say.

Q. Just like a wharf?

A. Just like a wharf; yes.

Q. About how far is the wharf above the tide-flat or ground or mud?

A. In some places there is mud clear up to the wharf, and in some places there is small holes through and through, and in some places there is dry wood under it.

Q. How much does it go above the mud?

A. As far as I went around here and along here (indicating).

Q. Around the glue-house, you mean, from the corner?

A. From the corner of the glue-house out that way (indicating) it is about six inches from the mud up to the cap lying on the piles.

Q. How far would that be from the wharf?

A. The cap, I do not know whether it is 12 by 12 or 12 by 14, and there is a 12 by 14 joist on top of that. [71—11]

(Testimony of Louis Godo.)

Q. How was it under the glue-house?

A. After you get inside of this line there (indicating), it is between a six and seven foot opening until you get to about here (indicating), back around the washer where they used to wash glue stock out in, and it gets down into the mud, and it gets lower here, and I should judge it is there about four feet in diameter.

Q. How far is it, then, from the tide-flats around in this direction east or north of the elevator-well?

A. Well, that is sloping off about four or five feet; it slopes down in here and slopes down in here.

Q. Did you ever work around the glue-house?

A. Yes, sir.

Q. When first?

A. The first time I worked there was in 1906.

Q. Whereabouts did you work?

A. I worked right opposite this washer, right up in here somewheres (indicating).

Q. How far away from the elevator-well and in what direction?

A. Well, I should judge about 25 or 30 feet from the elevator-well, southeast direction.

Q. Which way did you get there?

A. Well, I generally came in here (indicating) and went round in here. Sometimes we might have went out there (indicating), because in there was a space that was closed up with dirt, and there was an opening here and here was an opening.

Q. You mean it was closed up with dirt where it says "wall"?

A. About 13 or 14 feet up against the wall. There

(Testimony of Louis Godo.)

were boards stuck down to hold it back, and here was an opening and [72—12] over here was an opening (indicating).

Q. Where did you go the second time?

A. The second time—what's that?

Q. Did you go there a second time?

A. The first time I went through there I came through a little door about three feet square.

Q. When was this? A. This was in 1911.

Q. That is the second time you were in there?

Mr. EVANS.—Make a mark, please, where that door was.

A. Right about in here.

Mr. TEATS.—I will put a blue mark.

Q. About how many feet was the door from the corner? A. From the northeast corner?

Q. Yes, sir. A. About 25 feet.

Q. Which is north? A. That is the north side.

Q. It is hanging just right on the map, isn't it—north, east and south, isn't it? A. Yes.

Q. Twenty-five feet?

A. About 25 feet, something like that; I could not say for sure.

Mr. EVANS.—What is the scale of the map?

Mr. TEATS.—One inch of the map scales four feet.

Q. So that we will place a square there and call it "door." How big is that door?

A. About three feet square; might be a trifle more or less.

(Testimony of Louis Godo.)

Q. Was that out under the porch, under the platform? [73—13]      A. Yes, sir.

Q. Now, we have another mark on this map called sill; what is that?

A. That is the beam that goes across there where the joists rest on.

Q. Which way do the joists lay?

A. The joists lay north and south.

Q. Were you there when they constructed the elevator?      A. No, sir.

Q. They had that put in when you went back to work?

A. They had that when I came back to work from Aberdeen.

Q. What about Aberdeen?

Mr. EVANS.—We object to Aberdeen.

Mr. TEATS.—He was first working for you people at Aberdeen.

Mr. EVANS.—We object to that.

The COURT.—Objection sustained.

Mr. TEATS.—Q. This was during the year 1906. When you came back, when you went there, did they have this glue-house finished and the elevator installed?

A. Yes. Well, it was not finished, the machinery was not in. I helped put in the machinery.

Q. You helped put in the machinery?      A. Yes.

Q. What machinery?

A. Oh, all kinds of machinery, motor and fans.

Q. Did you help install the elevator?

A. No, sir.



(Testimony of Louis Godo.)

Q. Did you see it used after it was installed?

A. I seen it, yes, sir.

Q. And how about the counter-weights, I wish you would describe [74—14] that to the jury, how they were first installed.

A. The counter-weights were installed so that they come down that way over the joist.

Q. How many inches is that?

A. That is close to six inches. Some places kind of stuck out more, sometimes less.

Q. Where did the counter-weights come down?

A. They came down right in that corner.

Q. What corner? A. The southwest corner.

Q. And out of the well? A. Out of the well; yes.

Q. Or shaft?

A. Out of the well and out of the shaft.

Q. And about where we find an opening here on that line? A. Yes.

Q. Let's put "elevator weight" there. How far above the ground did the elevator weight come to?

A. Went down.

Q. Yes; when it was first installed?

A. Well, when it was first installed it was about six feet from the ground to the joists, and the elevator weight came down to the joists.

Q. And what was below the weight?

A. There was the sill that this building was standing on.

Q. How large a sill?

A. I cannot say that, whether it was double 3 by 14, or 3 by 14; whether it was double or single, I am not sure.

(Testimony of Louis Godo.)

Q. And what did that do?

A. That held the wall of the building where the studs were [75—15] laid on to it, that made the wall.

Q. And did that go across the space where we have “elevator weight”?      A. Yes.

Q. And where did the weights come to?

A. The weights come in to six inches above that when the elevator was first installed.

Q. Direct over it or how?

A. No; kind of sideways, on the side.

Q. On the inside part of it?      A. Yes.

Q. Now, how large were these weights—do you know?

A. I should judge they are about seventeen or eighteen hundred pounds; something like that.

Q. Those weights were for what purpose?

A. To balance the elevator, the weight of the elevator.

Q. And what way do they go?

A. When the elevator went up the weights come down, and when the elevator come down the weights went up.

Q. Did you ever see the working of the weights before this, during 1906, when you were around there?

A. I seen the workings of the weights just,—I boarded them in there and I seen them. They are boarded in from the first to the second floor with ship-lap on the outside.

(Testimony of Louis Godo.)

Q. You did that work of boarding them in then?

A. Yes.

Q. What year?      A. 1906.

Q. Did you ever have any occasion to use the space below the weights?    [76—16]

A. Not since 1906.

Q. What time was it, then, and what did you do?

A. Before the time of the accident?

Q. Did you ever have occasion to look at them?

A. Yes.

Q. Tell the jury about that.

A. That is the time we fixed for the ringer foundation.

Q. About when was it you were working under the glue-house or the ringer foundation?

A. To the best of my knowledge it was between the 15th and 20th of April.

Q. Nineteen hundred and what?      A. 1911.

Q. And who was working there with you?

A. Mr. Nelson or Olson.

Q. What did you do?

A. We put the plate down and put the studdings on and fastened them to the floor, and we put ship-lap on the outside.

Q. You were making a form for concrete work?

A. Concrete work; yes.

Q. That ringer foundation is made out of concrete, isn't it?      A. Made out of concrete.

Q. Run the concrete in?      A. Yes, sir.

Q. How were they using this elevator-way in this space below the elevator weight?

(Testimony of Louis Godo.)

A. Well, we come down to put in this form and there was about three feet of mud in the excavation, and we went up to Mr. Lundgren and asked him if we should take the water out, and he says, "No"; he says, "I will send Harmon [77—17] down"; he says—(interrupted.)

Mr. EVANS.—We move to strike that out.

The COURT.—Motion granted, and the jury instructed to disregard that part of the answer.

Q. Go on; tell what you saw.

A. He had a box running out through here (indicating).

Q. Out through where?

A. Out through there (indicating on Identification "A" at point marked counter-weight), and had four men standing by there and dipping water out of the plate, and two standing over this way (indicating), dipping water out.

Q. Just make a mark on the map with a blue pencil showing where that trough was and where it passed; make two lines—how wide was that trough?

A. It was made out of the whole width of the lumber, one by twelve for the bottom and one by twelve for the sides.

Q. What did they do with that trough?

Mr. EVANS.—We object to that as immaterial.

The COURT.—The objection is overruled.

A. They were getting water out of this pit.

Q. What were they putting in there? Taking out what—just water?

A. Water, yes; and dirt and mud.

(Testimony of Louis Godo.)

Q. Now, how long was that before your accident?

A. Well, that was between the 15th and 20th of April, 1911, to the best of my knowledge, and my accident was on the 27th day of May, 1911.

Q. At that time, where did the weight come down to when they had that trough through there?

A. Went to the floor. [78—18]

Q. Went to the floor of the building? A. Yes.

Q. Now, you may tell in your own way what you were doing and how you got hurt.

A. Well, Mr. Cornils come and told me to go under the wharf and get the measurements of this tank (indicating).

The COURT.—I cannot understand you.

A. Mr. Cornils told me to go down under the wharf and take the measurements for that tank, and I tried to get under the wharf at this corner (indicating).

Q. Put a mark with an X at the point where you tried to get under the wharf. At that time what had become of the platform?

Mr. EVANS.—We object to that as immaterial.

The COURT.—The objection is overruled.

A. The platform was torn away.

Q. And what was there?

A. There was the joists of this addition. There was an addition they built on there.

Q. So that you had to go under the floor of the new addition? A. Yes, sir.

Q. Now, go on and tell the jury.

A. This is the only place I had an opportunity to



(Testimony of Louis Godo.)

get under the wharf anywheres, and then I could not on account of the cap laid so close down to the mud or ground.

Q. Get under where?

A. Under this cap to get under the wharf.

Q. What do you mean by wharf?

A. The wharf is where—

Q. Outside of the building? [79—19]

A. Outside of the building, yes.

Q. That is over here to the north of the building, is that the wharf?      A. That is the wharf.

Q. And all around here is wharf (indicating), isn't that?      A. Yes.

Q. All right.

A. I could not get under there and so I asked, that is, I said to my partner—

Mr. EVANS.—We object.

The COURT.—Objection sustained.

Q. Just tell what you did.

A. "Got to go around the elevator there"—

Mr. EVANS.—We object and move to strike out what he said to his partner.

The COURT.—Objection sustained. Motion to strike granted.

Q. Who was working with you?

A. Mr. Nels Olson.

Q. Just state what you did before you went in there—what did you do?

A. Before I went in there?

Q. Yes; what did you do preparatory to going in there?

(Testimony of Louis Godo.)

A. I got a long pole about twenty feet long and a chisel.

Q. What for?

A. For to take the measurements with.

Q. All right.

A. And I took them with me and I could not get through, and so I came over here, and when I came over here I seen a broken timber here (indicating on the plat).

Q. Where did you see the broken timber? [80—20]

A. Right across here (indicating on plat).

Q. Where is that?

A. That is across where the elevator counter-weight comes down.

Q. All right.

A. I stopped and took a match and candle.

Q. What time of the day was this?

A. This was about ten or fifteen minutes past four in the afternoon.

Q. Why did you have to have a light?

A. Because I could not see any other way.

Q. Was it dark in there?

A. It was dark in there; yes.

Q. State in your own way what you did.

A. I lit the candle—the match, and held it on to the candle, and Mr. Olson—

Q. Show the jury. Which way were you standing?

A. Kneeling here on a plank on my knees. A fellow had put down the counter-weight, and as I held

(Testimony of Louis Godo.)

the match over to the candle the weight come down and struck me.

Q. Where did it strike you?

A. Struck me on my shoulders.

Q. What did it do to you?

A. It crushed me down into the mud, and that is the last I know about it.

Q. That is the last you know?      A. Yes.

Q. Take a blue pencil and mark dotted lines across the course you came, from the starting place to the place of the accident, just dotted lines.

(Witness does so.) [81—21]

Q. From your own knowledge, from what would you say if you know were you hit?

A. I did not know what hit me.

Q. When did you first remember anything after being taken from the building?

A. After I got out of the wharf.

Q. What did you do then?

A. Well, they sent for a cab and took me to the hospital.

Q. What hospital did you go to?

A. St. Joseph's.

Q. How long did you stay at St. Joseph's Hospital?      A. A little over four weeks.

Q. Then what did you do?

A. I went home, to my home.

Q. At your place of residence?      A. Yes.

Q. What were the injuries received at that time?

A. Well, I got my foot, ligament in my foot all pulled out.

(Testimony of Louis Godo.)

Q. Which foot?

A. The left foot, and the doctor told me I had three ribs fractured and my back injured.

Mr. EVANS.—I move to strike what the doctor told him.

The COURT.—Motion granted. You will not repeat any conversations you had with anybody at any time.

Mr. TEATS.—I think it is proper to say what the doctor told him.

The COURT.—The motion is granted, and the jury instructed to disregard anything the doctor said.

Q. Now, how about your foot?

A. My foot has got a little better, but very little.

[82—22]

Q. What, if any, did you suffer from the time of your accident—just tell the jury if you suffered any pain.

A. Well, I was unconscious for two days. I did not know anything about what was going on, and I had to lay 11 days on my back, could not turn in bed, and since I have been walking around with the cane, all I could do to get around a little.

Q. Did you use crutches at first?     A. No.

Q. Always a cane?     A. Always a cane.

Q. What pain—have you suffered any pain?

A. Always suffered pain.

Q. How much?

A. Well, sometimes more and sometimes less. Sometimes I am not able to raise up in bed, and

(Testimony of Louis Godo.)

sometimes I can get up.

Q. Why are you not able to raise in bed?

A. Because my back is injured.

Q. Where does your back hurt you?

A. Right across the small of the back, up through the middle.

Q. How long has that hurt you?

A. Hurt me ever since I was hurt—hurts me to-day.

Q. How is it as compared with what it was a year ago?

A. Well, it is not a bit better than it was a year ago.

Q. How is your foot?

A. My foot is a little better than it was a year ago; very little.

Q. Have any trouble with your foot now?

A. No; so long as I keep it in plaster and bandages.

Q. Do you have it in bandages now? [83—23]

A. Yes, sir.

Q. Who bandages it?

A. My wife bandages it every morning, and I have plaster around it from the doctor.

Q. Who puts it in plaster?

A. Dr. Brown, Dr. E. M. Brown.

Q. And how about your back—do you receive any treatments—how do you treat that?

A. Well, that has plasters on and bandaged up, and around here (indicating) I have to have a big canvas belt.



(Testimony of Louis Godo.)

Q. Around the abdomen?      A. Yes.

Q. And small of the back?      A. Yes.

Q. Now, Mr. Godo, how much did you weigh at the time of the accident, about?

A. Weighed 215 pounds.

Q. And what was the condition of your health then?      A. Good.

Q. How continuously were you at work before this accident?      A. Every day.

Q. How much did you earn?

A. Ninety-two dollars a month.

Q. What had you earned when you were working for others at your trade?

A. Four dollars a day.

Q. Have you worked any since?

A. No, sir—well, I made two attempts.

Q. Tell the jury about the first time.

A. The first time I got a job night watching in a mill out [84—24] on Center street, and there were three clocks to ring in the night and in different parts of the mill and the mill was shut down, and I could not stand the walking, and so I had to quit the job on account of my foot, so much walking.

Q. How long was that after that accident?

A. It was last December.

Q. Last December?      A. Yes, sir.

Q. How long were you on your feet then—how many hours were you compelled to be on your feet? I mean continuously.

A. I had to ring them bells every half hour.

Q. Every half hour?

(Testimony of Louis Godo.)

A. Yes, sir. From 9 o'clock at night until six in the morning.

Q. How long did you work at that time?

A. I worked there a little over three weeks.

Q. And why did you quit?

A. I could not stand it, I had to quit, and the man told me if I would not clean the log deck and clean the bark and stuff off the log deck I would have to quit the job.

Q. Did you try to clean the log deck?

A. I tried to clean it but I could not do it.

Q. Why? A. On account of my back.

Q. Then when did you next go to work?

A. I went to work on the 20th of January at South Tacoma in the car-shops.

Q. What doing?

A. Well, putting sheeting on box-cars. [85—25]

Q. And what success did you have there?

A. Well, I worked ten days first, and then I was going to quit and the boss told me to keep on and I worked two days more, and I had to give it up.

Q. Why?

A. Because I could not stand it. My back gave out—my back gave out.

Q. Now, altogether, how much have you earned since you were injured?

A. I earned about fifty dollars in these two positions.

Q. About fifty dollars altogether?

A. About fifty dollars altogether; yes, sir.

Q. When you were first taken to the St. Joseph

(Testimony of Louis Godo.)

Hospital, who was your doctor?      A. Dr. Braden.

Q. Was he your doctor?

A. He was appointed by the company to meet me there.

Q. Did you pay hospital fees?

A. We do that over there; yes, sir.

Q. You paid hospital fees over there?      A. Yes.

Q. Did you pay that fee?

Mr. EVANS.—We object to that as immaterial, and move to strike it out as not within the issues of the case.

The COURT.—Objection sustained and it will be stricken. The jury are instructed to disregard it.

Mr. TEATS.—Save an exception.

Q. How long did he treat you?

A. Well, he treated me until, I think, it was the 7th or 8th of August. [86—26]

Q. What did he do?      A. He didn't do nothing.

Mr. EVANS.—That is objected to as immaterial, not within the issues in the case.

The COURT.—Objection overruled. This simply goes to the method of treatment?

Mr. TEATS.—Yes.

Mr. EVANS.—There is no complaint here made of lack of treatment. We are not defending a malpractice action.

The COURT.—The objection may be overruled.

Mr. EVANS.—Note an exception.

The COURT.—Exception allowed.

Q. Did you employ other doctors?      A. Yes, sir.

Q. Who?      A. I employed Dr. Quivle.

(Testimony of Louis Godo.)

Q. Any other?      A. Dr. Reitz.

Q. And who else?      A. Dr. E. M. Brown.

Q. How long has Dr. E. M. Brown been treating you?

Mr. EVANS.—We object to that as immaterial.

The COURT.—Objection overruled.

A. Since the 5th of March.

Q. March when?      A. 1911.

Q. 1911 or 12?      A. 1912.

Q. Now, what pain did you first suffer and how much?

A. I cannot explain how hard I suffered. [87—27]

Q. Can't you explain it at all?

A. I could not raise in bed and I could not turn around in bed.

Q. Where was your pain mostly at that time?

A. In the sides and back.

Q. And whereabouts in the sides?

A. On this side (indicating right side), and on this side here.

Q. Below the short ribs?

A. In this side below the ribs around this way.

Q. Has that pain left you down below the short ribs?      A. No, sir.

Q. Do you experience any pain now?

A. Yes, sir, every day.

Q. Under what circumstances?

A. Kind of dead pain in my back.

Q. Under what circumstances? Is it paining all the time or do you—

(Testimony of Louis Godo.)

A. Paining all the time; even if I sit still as I do now, it pains now.

(Recess, after which, the call being waived and the jury all being present, the trial is continued as follows:)

Cross-examination.

(By Mr. EVANS.)

Q. Mr. Godo, how long have you been a millwright?

A. Since I started to work for Carstens Packing Company.

Q. Back in 1906? [88—28]

A. Well, before that; in 1903 and 4 I started in.

Q. There a couple of years at that time, approximately?

A. Well, I am not certain whether it was in October, 1902, or 3, I started to work for them.

Q. How many times had you worked underneath the glue-house?

A. Well, I had been working there occasionally off and on.

Q. Now, tell me how many times you had been working under there.

A. Well, in 1906 I put in shafting there.

Q. You put in shafting? A. Yes.

Q. Where did you put in the shafting?

A. I put it in the south side of the big washer.

Q. What you refer to as the big washer is that big tank that is situated over there (indicating on the plat)?

A. That is down on the floor, round tank.



(Testimony of Louis Godo.)

Q. That is over in here, that shafting is?

A. Yes, sir.

Q. That is fifty to one hundred feet from the counter-weights? A. No.

Q. How much?

A. It is about 25 or 30 feet.

Q. Twenty-five or 30 feet from the counter-weights? A. Yes, sir.

Q. That was in 1906? A. Yes, in 1906.

Q. How many times were you under there that time?

A. We were working there that spell about three days and then taken away and went back there again.

Q. How did you go in? I understand you at that time, you went in this little door over here? [89—29]

A. No, sir; there was no door then at the time we put that shafting in there.

Q. There was not any door?

A. No, sir; the platform was not put up there.

Q. The elevator was not constructed?

A. Yes; the elevator was constructed.

Q. The elevator was there? A. Yes.

Q. Where did you go in at that time?

A. We went in any place into there, along there and along there any place (indicating on the plat).

Q. You could go in under any place?

A. Any place; yes, sir.

Q. As a matter of fact, underneath the glue-house it was all open except that elevator-well and the up-

(Testimony of Louis Godo.)

rights where the counter-weights run, wasn't it?

A. No; there was a place there in front just opposite the glue-house where there was some dirt shovelled and some sticks stuck up and down to hold that dirt there.

Q. That is along where?

A. About 15 feet from the elevator.

Q. Fifteen feet from the elevator?      A. South.

Q. This way?      A. Yes.

Q. In this direction (indicating)?

A. There was an opening close to the elevator and there was an obstruction there about fifteen feet from the elevator.

Q. At that time you could crawl right along under here (indicating)? [90—30]

A. Yes, sir, you could go anywhere.

Q. And aside from that little obstruction at one place where there was dirt you could have free access under the whole of that glue-house?

A. Yes, sir, except where the elevator-well was and the counter-weights run, and the washer.

Q. That is the large tank over here?

A. Yes, sir.

Q. That was in 1906 you were working there putting the shafting in?      A. Yes, sir.

Q. You observed the elevator and counter-weights at that time, did you not?      A. Yes, sir.

Q. Was it light enough under there that you could see?      A. It was before it was closed up.

Q. Before it was closed up?      A. Yes.

Q. And you observed them at that time?

(Testimony of Louis Godo.)

A. Yes, sir.

Q. When did you next work under there?

A. I next worked under there in 1911, when I put in that foundation for that ringer.

Q. So that from 1906 to 1911, at the time you put the ringer foundation in there, you had never been under there?

A. Well, I was on small occasions, just to do some repairing.

Q. What small occasions?

A. Perhaps tighten up the boxes or tighten up the setscrews.

Q. Give me any specific time that you went under there.     A. I could not give you that. [91—31]

Q. What did you go to fix?

A. Well, sometimes might have went to tighten a box.

Q. You say that you might have gone?

A. Sometimes I did.

Q. Are you positive you did?

A. Yes, sir, I did.

Q. When was that?

A. 1906. That was in 1906, and I was under there in 1910 and took out some of that conveyer.

Q. You do remember in 1910 about taking out some of the conveyer.     A. Yes, sir.

Q. Where is that or where was it?

A. That conveyer is in the south side of the washer.

Q. That is over in here?

A. No, it is further up this way (indicating).

(Testimony of Louis Godo.)

Q. Over here (indicating)?

A. At that big tank.

Q. How did you get under there at that time?

A. I went in through that little door.

Q. At that time you went through this door, did you?

A. Yes, sir.

Q. Did you observe the elevator and counter-weights at that time?

A. Not in particular.

Q. Not in particular?

A. No.

Q. Now, when did you next go under there?

A. That was when we built that foundation.

Q. Then the next time was when you built the foundation, was [92—32] it?

A. Yes, sir.

Q. When you built the foundation, how did you go in there?

A. I went in through the door, that little door.

Q. In through that little door (indicating on the plat)?

A. Yes.

Q. And that foundation was built in April and you were injured in May?

A. Yes.

Q. Now, at that time I believe you testified you observed the elevator and counter-weights.

A. Yes, sir, I did.

Q. Had the break in the cable occurred at that time?

A. No, sir.

Q. So that you now testify that the change in the counter-weights allowing them to come down was made after you built the ringer foundation?

A. Yes, sir.

Q. And you observed the counter-weights at that time so that you knew where they came to?

(Testimony of Louis Godo.)

A. I knew they did not come through the floor at that time.

Q. You mean you did not see them come through, don't you?

A. I did not see them come through, and I did not see the sill broken.

Q. What? A. I did not see the sill broken.

Q. The sill broken? A. Yes.

Q. That broken sill was down in the mud, was it?

A. Yes, sir, both ends of it was down in the mud.

[93—33]

Q. That was the mudsill, wasn't it?

A. No, it was the joist of the building where the whole building rested on.

Q. And when did you notice that break?

A. I noticed that break when I went in there to take measurements for that tank.

Q. How far was it from the mudsill immediately under the counter-weight or elevator weight,—(illustrating). Say this is the mudsill, the bottom of this blackboard, how far was it from that counter-weight up on this upright shaft that the counter-weight run in to the floor above?

A. When, when I got hurt or before?

Q. At the time you got hurt.

A. That was about four feet.

Q. About four feet? A. About four feet.

Q. When you started to go through,—when you came in there you started to go through under the counter-weights, did you?

A. I was right on my knees when I was lighting



(Testimony of Louis Godo.)

the match to see if there was anything wrong.

Q. You lit the match before you started through there, did you not?     A. Yes.

Q. Did you have any other light with you at all?

A. I had the candle.

Q. Nothing but the candle?

A. Nothing but the candle.

Q. And have you observed elevators in your experience and [94—34] in your work?

A. Yes, sir.

Q. And counter-weights?     A. Yes, sir.

Q. The track or uprights that the counter-weights work on were practically clear down to the mudsill, were they not?     A. Yes, sir, they always was.

Q. And there was nothing to stop the,—

A. No.

Q. (Continuing.) Counter-weight coming down if the cable was long enough to let it come, was there?

A. There was not.

Q. The only change that was made, that you know anything about, was the lengthening of the cable?

A. The lengthening of the cable.

Q. You knew that the counter-weight broke?

A. I was told they fixed the cable.

Q. You knew the cable broke?

A. I knew the cable broke; yes.

Q. And you say before it only came to the floor?

A. Within six or seven inches of the floor.

Q. Above?     A. Above; yes, sir.

Q. Have you ever observed an elevator when it is being operated that sometimes they don't stop it at

(Testimony of Louis Godo.)

the proper place and it goes a little above the floor or a little below, and it will kind of bounce up and down?

A. The elevator cannot go any farther when it gets to the top floor.

Q. It could not go any farther? [95—35]

A. No.

Q. How many times did you see the elevator operated?

A. I seen that one hundred times a day, sometimes.

Q. How many times did you see the cable that it is operated on? A. Operating?

Q. Yes.

A. Well, I could see that most any time when I went under the building there before.

Q. You could not see that unless you were under the building?

A. No, I could not see them under the building. I could see them before they were enclosed.

Q. You could see them before they were enclosed?

A. Yes.

Q. How many times did you see them?

A. I could see them when they worked the elevator when I was under there.

Q. Do you know whether the elevator was clear up or not? A. When?

Q. When the counter-weight was down?

A. I could see them go through there.

Q. You would see the elevator going up and the counter-weight coming down? A. Yes.

(Testimony of Louis Godo.)

Q. You did not know what the position of the elevator was?

A. They could not go down any further than to the floor when the elevator was up to the top.

Q. Did you ever test it or use it to see whether they could or not?

A. I seen people go up and seen them take loads to the top [96—36] floor, and that is as far as they went, and the counter-weights only go to six inches of the floor.

Q. You do not know whether they could go six inches above that or not?

A. They could not unless the cable is broke.

Q. They could not go any further? A. No.

Q. You swear positively at this time that counter-weight did not come down to the floor?

A. Not at that time when I closed it in.

Q. When you closed it in?

A. Closed it in over the counter-weight.

Q. When was that? A. 1906.

Q. Now, did you ever observe that counter-weight after 1906, after you enclosed it?

A. No, not until I got hurt.

Q. You did not ever see it until you got hurt?

A. No, sir.

Q. Isn't it a fact those elevators have to be frequently repaired?

A. Well, frequently repair the elevator, but,—(interrupted).

Q. Isn't that the fact with reference to the cables?

(Testimony of Louis Godo.)

Mr. TEATS.—We object to him interrupting the witness.

A. But that cable has never been fixed before.

Q. How do you know—you were not there from 1906 to 1910?

A. If it was fixed, it was never fixed so that it come down below the floor; of course, that shows because when the weight struck it broke the sill when it went down.

Q. How do you know it was not fixed? You did not see it [97—37] and never examined the counter-weight? A. It never come below the floor.

Q. How do you know that?

A. I seen that before I was hurt.

Q. You seen that in 1906?

A. I seen it after too, yes, 1911.

Q. You saw it in 1911? A. Yes.

Q. A minute ago you said you had not seen the counter-weight again after you boxed it in?

A. I seen it when I was putting in that foundation for the tank,—

Q. Putting in the foundation?

A. I seen it did not come down below then.

Q. How many times did you look to see?

A. I was sitting there about half an hour waiting for the boys to dip the water out of the foundation so that we could go in and put in our forms.

Q. Where were you sitting?

A. Sitting on the box that goes over back of the elevator.

Q. It was a kind of trough? A. Yes.

(Testimony of Louis Godo.)

Q. Where did that trough run to?

A. That trough run out beyond the elevator as you see it indicated on the picture?

(Referring to Exhibit "A," the plat.)

Q. It did not run under the counter-weight, did it?

A. Yes, sir.

Q. Here (indicating on plat)? A. Yes, sir.

[98—38]

Q. Are you positive of it? A. Yes, I am.

Q. Wouldn't the counter-weights smash it?

A. They did not come through there, so that they could not smash it.

Q. They did not come through there?

A. No, sir.

Q. So that they could not smash it?

A. So that they could not smash it.

Q. And it was right down under that weight?

A. It was through that hole right under that weight.

Q. You sat by the ringer foundation and watched that thing, did you?

A. No, I was sitting on top of that box.

Q. Right there near the counter-weights?

A. Well, I sat probably in the middle of the box there.

Q. And how many trips did you see it make?

A. Which?

Q. The counter-weight.

A. The counter-weight; I never seen it make any trips then; it did not come down then at all.

Q. Do you know whether the elevator was being



(Testimony of Louis Godo.)

operated, or not?

A. Yes, the elevator was being operated. I could hear that.

Q. How many trips did it make?

A. It must have made half a dozen trips.

Q. You do not know whether it went to the first, second or third floor or how high up, do you?

A. They were taking some wool up.

Q. How do you know? [99—39]

A. I seen it through the opening; they were dragging wool into the elevator.

Q. It was light enough so that you could see outside and see what was going on under the wharf?

A. I could see what was going on outside from the inside.

Q. You sat there for half an hour, you say?

A. I think one-half an hour, I should judge.

Q. At the time you were putting in the ringer foundation? A. Yes, sir.

Q. What were you doing sitting here?

A. Waiting for the fellows to dip the water out.

Q. Were you talking to anybody?

A. Talking to my foreman and them fellows, the foreman and the other man.

Q. Where was he? A. Who?

Q. Your partner.

A. He was sitting alongside of me.

Q. Which side of you was he?

A. Of that I could not swear.

Q. Was it toward the counter-weight or the other way?

(Testimony of Louis Godo.)

A. I think he was sitting next to the foundation.

Q. That would be next to the counter-weight, would it?

A. No, that would be away from the counter-weights.

Q. You sat there talking to him?      A. Yes.

Q. Which way were you facing?

A. I was facing lots of ways—facing out, looking out under the wharf at that and looking at the men that were dipping the water, as a man is when he is sitting. [100—40]

Q. As a matter of fact, you were not paying any attention to the counter-weight?

A. I could not say I did not pay any attention, but—

Q. You did not notice the counter-weight while you were sitting there, did you?

A. No, I did not—

Q. You did not glance up—

Mr. TEATS.—We object to counsel interrupting the witness.

The WITNESS.—If it had come down it would have certainly smashed that box and I would have noticed it, but it did not come down there.

Q. As a matter of fact, you did not notice whether it came beneath the floor at all or not, did you?

A. No, I do not know.

Q. You do not know at that time from your observation whether it came below the floor at that time?

A. It did not come below the floor at that time.

(Testimony of Louis Godo.)

Q. You are positive of that?

A. I am positive of that.

Q. You know it could not have come below the floor at that time?

A. Not on that length cable they had.

Q. If it had been on a cable that came below the floor you would have discovered it, would you?

A. Yes, sir, I would.

Q. You could not help seeing it while you were sitting there?     A. Yes.

Q. And if it develops in this trial from the records of the company that the change was made and the cable was lengthened out two or three months before you put the [101—41] ringer foundation in there, then you are mistaken?

A. That was no such a thing.

Q. You are positive of that.     A. Yes, sir, I am.

Q. If the change was made before you put the ringer foundation in there, then when you were sitting there at that point you could have seen it?

A. Yes, sir.

Q. And you would have known about it?

A. Yes, sir.

Q. And if you had exercised your faculties you would have known it was there?

A. I could have because it would have smashed that box, the counter-weight coming down within six inches of the floor, of the ground.

Q. Now, I want to call your attention to Defendant's Identification 1, and ask you to tell what that picture is.

(Testimony of Louis Godo.)

A. That was not there when I was there.

Q. Have you ever been there since the tank was put in?     A. No, sir.

Q. Wasn't you over there the other day?

A. No, sir.

Q. With the exception of the tank. Leaving the tank out of the picture, isn't that a photograph of the packing-house at the time you went there to make the measurements?

A. That is something that was not there when I was there.

Q. Well, from there down is all I care about, where the stuff runs out into the tank.

A. I never saw the stuff—

Q. Leaving the tank out. From the tank on down this way does [102—42] the picture—

A. This is the way it was at the time I was there.

Q. And you were putting the tank in that wharf in the position this tank is in, weren't you?     A. Yes.

Q. And the studding that you were to measure is the studding that this tank rests on there, wasn't it?

A. I do not know a thing about that, because I did not get to see.

Q. You were told to get the measurement of the studding next to that place.

A. I was told to get the measurements from the building to the next cap.

Q. The next cap?     A. The next cap.

Whereupon Identification 1 is offered in evidence by the defendant, received in evidence by the Court

(Testimony of Louis Godo.)

without objection, and marked as Defendant's Exhibit 1.

Q. I show you Defendant's Identification 2 and ask you if that shows the side of the glue-house showing the elevator-well and the space left vacant between the wharf and the building.

A. That is the place where I was.

Q. Does that show the correct position?

A. That is the correct position where I went in under.

Q. Where did you crawl under?

A. Right here on this corner.

Q. Mark that with an X there. And this open door here shows the elevator, does it—that shows the elevator? [103—43]

A. That shows the elevator on top of the wharf.

Mr. EVANS.—We offer this in evidence.

The COURT.—It will be admitted.

Thereupon said photograph, Defendant's Identification 2, is received in evidence and marked Defendant's Exhibit 2.

Q. Now, Mr. Godo, we will say that this is the side of the Judge's desk, and this ruler is the track or uprights in which the counter-weight runs.

A. Yes, sir.

Q. Now, before you get to that, right at the side of it is an opening, is there not?

A. There was not at the time I was there.

Q. There was not any opening there? A. No.

Q. And on the other side right here there is an opening, is there not? A. No, sir.



(Testimony of Louis Godo.)

Q. And then right in front of you—(Interrupted.)

A. Which side are you talking about?

Q. The right.      A. Only to the south.

Q. To the right of the counter-weights you could go in there.

A. Well, when I was there was boards stuck up and down there and dirt piled in it, old boards to hold back the dirt.

Q. Now, I will ask you if right in front of you you could not go right straight ahead, and right around the counter-weights and have the whole area underneath that packing-house in which to go around to the place you thought you could [104—44] measure through?      A. Which?

Q. Right on beyond where the counter-weights were, the whole area under there was open, wasn't it?

A. Yes, sir; that is 15 feet from the counter-weight; there was a place 15 feet from the counter-weight that was not open.

Q. I will show you Defendant's Identification 3 and call your attention to a gentleman in the picture and the opening through which you look to see him. Was that opening there when you were hurt, right where Alstrum is sitting?

A. I cannot see where that is.

Q. I will call your attention to the fact that here is the opening of the counter-weight between these two uprights; was that opening there?

A. That is under the new building.

Q. Now, right straight from where you crawled in, just after crawling in, assuming you crawled in at

(Testimony of Louis Godo.)

the place you said you did right here at this X, the counter-weight would be back of the elevator here, wouldn't it?

A. Right back that way (indicating).

Q. Right back over here?

A. No, you could not see that. This is the elevator on the north side and the counter-weight is on the south side of the elevator.

Q. That is what I am getting at, and it is about in a parallel line with this side of the elevator.

A. No.

Q. How far back is it? [105—45]

A. Well, it comes just down to the corner of the elevator.

Q. It comes down at the corner of the elevator?

A. Yes.

Q. Now, when you got there you started to go through right here at the point under the counter-weights.

A. Well, I tried to get through there first and then I come around here (indicating).

Q. Wasn't it open so that you could go right straight ahead?

A. It was open, but, my God! the dirt there was there to crawl through. A man has to go on his knees. He wants to go the shortest route he can.

Q. It was dirty under there—you know under that packing-house it was just tide-flats and soft mud?

A. Certainly.

Q. And you could have gone straight ahead and

(Testimony of Louis Godo.)

gone around the elevator shaft entirely, couldn't you?

A. I could have gone out that way by going 20 feet more—15 feet more.

Q. Looking at your plat here, you stated that you came in right there where the letter H is.

A. Yes, sir.

Q. You came down here to where the counter-weights are and started under? A. Yes.

Q. You could have come right straight ahead and climbed over that studding, gone right straight and around to your point of labor, couldn't you, that you intended to go to? A. I could do it.

Q. You could have done that, that was open? [106—46] A. That was open.

Q. And you could see it?

A. Yes, I could see it.

Q. You knew there was no counter-weights or anything else over there? A. I did.

Q. Now, nobody told you to go under the counter-weights, did they?

A. They did not. They told me to go under the wharf.

Q. They told you to go under the wharf?

A. Yes.

Q. You do not know of any work being done under that packing-house over on the side beyond the elevator shaft, along the wall adjacent to the new tank, do you, prior to that time? A. No, sir.

Q. The only work that had been done under there at all was to put in this big vat over to the other side

(Testimony of Louis Godo.)

of the packing-house, wasn't it, and this ringer foundation?     A. Yes, sir.

Q. That was the only thing that would occasion any men to go under there at all?

A. Have to go under there to draw the water out of the washer?

Q. You had never been under there at all yourself?     A. Never under there.

Q. Did you know of anybody that had been over there?     A. I did not.

Q. Did you know of any occasion that anybody would have to go in there?

A. Not to my knowledge.     [107—47]

Q. Did you know whether or not you could go under the wharf there at all?

A. I knew I could go through there by cutting a hole in the plank.

Q. Did you have anything with you to cut that away?     A. Yes.

Q. What did you have?

A. I had a hammer and chisel.

Q. You took a hammer and chisel and a pole twenty feet long?     A. Yes.

Q. To go down there to get under the wharf, that is what you were going to try to do?     A. What?

Q. You could have taken up the plank on the wharf and made your measurements without going under the building at all?

A. I could, but Mr. Cornils would not let me.

Q. Cornils would not let you?     A. No.

Q. What did he say?

(Testimony of Louis Godo.)

A. He says, "If Tom sees you pulling up the wharf, he will give you hell."

Q. That is Tom, Mr. Carstens?      A. Yes.

Q. You want the jury to understand that Mr. Cornils, the master mechanic, told you that if Carstens caught you taking up the planking to make the measurement for that tank he would give you hell—is that it?      A. That is what he told me.

Q. You were going to cut the wharf out to set the tank in [108—48] in there, weren't you?

A. He told me he would have the laborers to do that work.

Q. He was going to have it done?

A. He was going to have the laborers do that work.

Q. What you were to do was to get the measurement from the building, from the foundation, over to this cap?      A. Over to that cap; yes.

Q. You say he told you to go under the wharf?

A. Yes.

Q. Why didn't you go under the wharf?

A. I could not go under the wharf.

Q. Did you tell anybody you could not go under the wharf?      A. I did not.

Q. You did not?      A. No.

Q. You went this same way because that suited your convenience to do that work that way, did you?

A. I had to do it, because I always had to do what I was told.

Q. And if a man told you to butt your head against a wall you would not make any remonstrance—you would go and do it?



(Testimony of Louis Godo.)

Mr. TEATS.—I object to that.

Q. If he told you to do an impossible task you would go and try to do it without any question, would you?

Mr. TEATS.—I object to that as immaterial.

The COURT.—Sustained as argumentative.

Q. You knew you could not get under the wharf at all, didn't you?

A. Not at the place I tried to first, but I knew I could get a measurement by cutting a hole in the building [109—49] over on that side.

Q. Over on what side?

A. On the north side of the building.

Q. Was that the only place you could cut a hole through? A. By going under the wharf.

Q. It was the only place under the whole building where you could do that?

A. Well, I had to go to the place where I could make the measurement, that is the certain place where that plank was situated.

Q. You had never been there?

A. I ain't, but I know I could get through.

Q. But you did not know whether you could get through there or not?

A. I know I could not get through there unless I cut a hole in the wharf.

Q. You could cut a hole in the wharf before you got through there, couldn't you?

A. No, I could not get my measurements until I got to the certain place where the tank was situated.

Q. Why could not you have cut the hole where you

(Testimony of Louis Godo.)

tried to get under there?

A. Because I had to get my measurement.

Q. You could have gone under the wharf and got the measurement there, couldn't you?

A. I could not get under the wharf unless I could cut a hole out of the cap, so that I could crawl in.

Q. If you had cut your hole down here this side of the elevator shaft, you could have gone through there and gotten under the wharf through there?

[110—50] A. There was no place there.

Q. The wharf was higher than the other floor, wasn't it?

A. The cap was just about six inches from the dirt, from the muck, and I could not crawl under there.

Q. The only direction you had was to go under the wharf. A. To go under the wharf.

Q. And make that measurement.

A. And make that measurement.

Q. You are positive that Pete told you you could not take up the plank on the outside? A. Yes, sir.

Q. Do you remember anything that was said to you immediately after you were hurt?

A. Yes, I remember, not immediately, but on the way to the hospital.

Q. On the way to the hospital? A. Yes.

Q. Do you remember anything that was said right there at the time?

A. Not as I remember. I know I cannot recall anything that was said there, only Mr. Cornils come and wanted me to sign a paper while they were tak-

(Testimony of Louis Godo.)

ing me into the ambulance and taking me to the hospital.

Q. You were not unconscious at that time?

A. No, I was not then.

Q. Didn't he say to you, "Why didn't you obey my instructions?"

A. No; he did not say anything of the kind.

Q. Did not make any such remark as that?

A. No, sir.

Q. Who was there? [111—51]

A. I do not know who was there when they took me out.

Q. Who was there when he told you to give him the release? A. There was not anybody with me.

Q. Just you and Pete? A. Me and Pete.

Q. Now, Mr. Godo, I show you Defendant's Identification 4, which purports to be a picture of the counter-weight clear down, and ask you if that represents the situation there, with the exception that the counter-weight is down?

A. Them openings were not there at the time I got hurt.

Q. This opening here marked A and this opening here marked B, were they there at that time?

A. No, they were not there.

Q. I refer to these here.

A. Them openings there were not there at the time.

Q. There were not any openings along the side of the counter-weight? A. No, only along the sill.

Q. Up to the top along the sill?

A. Up to the top.

(Testimony of Louis Godo.)

Q. There was not any perpendicular opening here as shown in this picture? A. No, not that I seen.

Q. Was there anything there at all?

A. I could not say. Of course I did not get so far over; I did not get to see it.

Q. When you went under there this counter-weight was about how far from the side of the building?

A. That I could not say. That was about six inches from the west plank of the elevator shaft there. [112—52]

Q. Approximately how far out from the wall there? A. It was about eight feet.

Q. About eight feet from where you crawled under to where the counter-weight was? A. Yes.

Q. It was daylight when you went under there, wasn't it? A. At that time it was light.

Q. There was a hole the light came through?

A. Yes, there was a hole the light came through.

Q. And you could see the general surroundings?

A. Yes.

Q. You could see that was the place where the counter-weight run? A. Yes.

Q. You could see the grooves on the plank, on the side of the counter-weight shaft?

A. I could not see the grooves, but I could see the lead taps.

Q. You knew that was the counter-weight track?

A. Yes.

Q. You could see generally the place right ahead of you? A. I could.

(Testimony of Louis Godo.)

Q. You knew it was all open under there with the exception of that space, didn't you?   A. Yes.

Mr. EVANS.—I offer in evidence Number 3.

Mr. TEATS.—We object to that, the conditions were not the same when the picture was taken as they were at the time of the accident.

The COURT.—The objection will be overruled. The jury will understand the differences he pointed out. [113—53]

Thereupon said photograph is received in evidence by the Court and marked as Defendant's Exhibit No. 3.

Q. The opening where the man is shown was, I believe you testified, in Number 3?   A. Yes.

Mr. EVANS.—I will offer Number 4 too. He said the only difference is he didn't think these openings were on the side of the counter-weight.

The COURT.—It will be admitted subject to the exception regarding the condition.

Thereupon said photograph is marked as Defendant's Exhibit Number 4.

Q. The condition as to the light had not been changed between the time you sat on the box and watched the proceeding there in April, and the time you got hurt, so far as the light was concerned?

A. Not to my knowledge,—well—

Q. It was just as open as it had been before?

A. No, it was not. There the addition, the new building built on there, and there was a flooring laid that made it darker all over.

Q. That building was there at the time the founda-



(Testimony of Louis Godo.)

tion was put in, wasn't it?      A. No, sir.

Q. In the course of construction?

A. They just started to cut the hole in the wharf for the posts.

Q. That new building was built on the outside of the other building, wasn't it?    [114—54]

A. Yes.

Q. And there was a wharf out from that old building at the time?      A. Yes.

Q. So that so far as this opening and where you crawled in on the day you got hurt, that was all just in the same condition?

A. That was all in the same condition.

Q. And the light from that point came just the same at the time you got hurt as it had before?

A. Yes.

Q. It would be just as light as the place you sat as it was before?      A. Yes.

Q. Where did you say this counter-weight hit you?

A. It struck me on my shoulder.

Q. Which shoulder?

A. Right across the back.

Q. Right across the shoulders?      A. Yes.

Q. Just indicate on me where it struck you.

A. Right there (illustrating on counsel).

Q. Above your shoulder blades?

A. Right there.

Q. It hit you above your shoulder blades?

A. Yes.

Q. How did you hurt your foot?

(Testimony of Louis Godo.)

A. The foot was caught on the plank I was standing on.

Q. The foot got caught on the plank?

A. I was forced over. I do not know how I got hurt, but I [115—55] was on that plank.

Q. You were held there?

A. It crushed me with the weight.

Q. It held you there until they raised it up?

A. Yes, it held me there until they raised it up.

Redirect Examination.

(By Mr. TEATS.)

Q. Whereabouts is the wharf—can you tell by looking at Number 2? What do we understand by the wharf?

A. The wharf is off here (indicating).

Q. Is this the wharf here, this plank?

A. Yes.

Mr. EVANS.—The flooring where the figure 2 is written.

Mr. TEATS.—Q. And where you went under is at this first opening here from the elevator?

A. Right there at the corner.

Q. This one here? A. Yes.

Q. Now, when you got down in there, what did you find? A. Found some dirt and mud and shit.

Q. Filth and manure?

A. Filth, manure and everything.

Q. How deep was it?

A. I went down one foot, pretty near.

Mr. EVANS.—I move to strike that out as not re-direct.

(Testimony of Louis Godo.)

The COURT.—Why are you going over this again, Mr. Teats?

Mr. TEATS.—To show the condition. His main stress is why didn't he go through some other way.

The COURT.—Objection overruled. [116—56]

Mr. EVANS.—Exception.

The COURT.—Exception allowed.

Mr. TEATS.—Q. The question was asked you why didn't you go through here where you see Alstrum. Is Alstrum in the courthouse?

A. No, sir.

Q. Why didn't you go through there?

A. I didn't like to crawl on my knees in that dirt and mud and filth.

Q. Over there beyond this space?

A. Over there beyond this space.

Q. Look at Number 4. Do you recognize the weight there? A. Yes, sir.

Q. When did you ever see that down in that position? A. Never did.

Q. Never did see it? A. No, sir.

Q. Now, you were speaking about a broken plank. Can you explain it more fully to the jury by number 3?

A. That comes across here (indicating), comes across there, over there by the wharf. This picture shows under the floor; it shows the joists. Right on top there it was broke.

Q. Which was broke?

A. The joist forming this top.

Q. When did you first know that was broken?

(Testimony of Louis Godo.)

A. When I tried to get through here.

Mr. TEATS.—The space we are looking at is the second space in the photograph.

Q. And that space we will mark with a round mark, circular [117—57] mark.

A. Yes, I think that is about where it is.

Q. About how wide is that space?

A. That space there,—

Q. Where the counter-weight came down?

A. That is a little over two feet.

Q. Can you explain by Number 4 where that broken plank was? A. No, it don't show there.

Q. I know the broken plank don't show, but can you show the space where the broken plank was?

A. It was right on top there, top of the joist.

Q. What is this plank here that we see?

A. Where the joist lays on.

Q. That is one of the joists that go through there?

A. Yes.

Q. Was this plank like a trough, laying flat?

A. No, it was standing on the edge, broke down on the edge.

Q. Broke down on the edge?

A. It fell right out from the studding.

Q. Now, he would have you say in his examination that there were some guides up and down?

A. Yes, sir.

Q. In which at the time you were hurt the counter-weights ran. Did they run down in here?

A. Yes, sir, they run down in here.

Q. Could you see them? Did you know the coun-

(Testimony of Louis Godo.)

ter-weights ran down?

A. I did not know the counter-weights run down, but I seen the guides.

Q. Were the guides there too? [118—58]

A. Yes, sir.

Q. Was there anything there to indicate that the counter-weights came down?

A. Not that I could see.

Recross-examination.

(By Mr. EVANS.)

Q. What did you think those guides were there for? A. What is that?

Q. What are those guides for?

A. Down there?

Q. Yes.

A. I don't know what they were down there for.

Q. Well, they were just the same as they were above, where the counter-weight run, just a continuation? A. They did at the time I got hurt?

Q. They were there before you were hurt?

A. They were there.

Q. Never been any change in them, so far as you could see?

A. No, not as far as I can recollect.

Q. Just the same clear up and down, they ran clear down in the mud? A. Yes.

Q. Now, what do you suppose they put those guides there for?

A. That is more than I can tell you. Have them there to run the counter-weights on.

Q. You say that there was a beam or plank



(Testimony of Louis Godo.)

broken?      A. Yes.

Q. Where was that?

A. That was right up over, from this girder over to the [119—59] outside girder.

Q. From this plank or beam?

A. Or joist; yes.

Q. Now, how far down did it go?

A. It go right down to the mud, one end of it.

Q. One end of it came right down in the mud here?

A. Yes.

Q. And you tried to crawl over that?

A. No, I was trying to crawl under it, through here (indicating).

Q. You were trying to crawl under it?

A. Yes.

Q. It was not in this space, was it (indicating)?

A. No, the break was over close by the girder.

Q. How did it hinder you from going through there?

A. It did not hinder me from going through; I was going through there.

Q. What has that got to do with the story?

A. I guess when that cable broke that counter-weight broke that joist.

Q. Oh, it did?      A. Yes.

Q. When the cable broke it broke that joist?

A. Yes, sir, that joist.

Q. And they never had to fix it?

A. No, never to my knowledge.

Q. Were you there when they broke it?      A. No.

Q. This joist is out to the side of the guides of the

(Testimony of Louis Godo.)

counter-weight track, isn't it? [120—60]

A. I do not know whether it is or not, but it is under the whole of the building, and the guides were naturally nailed to the studdings.

Q. You can see it right there in the picture, can't you? A. I cannot see that exactly.

Q. Let me call your attention to that line right up there, and ask you if that don't look like a picture of the guide.

A. Well, it might be, but I cannot say for sure.

Q. Now, what broke there was the—well, we will say this is the counter-weight, the cable being fastened into the counter-weight at the top, and the cable broke off here by the counter-weight (illustrating)? A. Yes.

Q. And let it drop down? A. Yes.

Q. Explain to me how it broke that joist.

A. Of course the counter-weight got out over the joist.

Q. The counter-weight got out over the joist?

A. Yes.

Q. Clear out here over the joist (indicating)?

A. Yes.

Q. How could that get over the joist if it run in the track?

A. The counter-weight was bigger than the roads, and them roads was right up against the joists.

Q. It ran up above there all right?

A. It ran up above there all right, there was nothing to hinder it above.

Q. How big was this joist?

(Testimony of Louis Godo.)

A. I do not know whether it was 12 by 12, or 13 by

12. [121—61]

Q. Were you there when the accident happened?

A. Which?

Q. When the joists got broken? A. No, sir.

Q. When had you ever seen it?

A. Seen it when I went under there.

Q. Did you ever hear of it before? A. No.

Q. How do you know the counter-weight broke it?

A. Because there was no other weight to break it.

Q. That is your conclusion? A. Yes.

Q. From what you saw there, that sometime prior to that the counter-weight fell and broke it?

A. I do not know about that.

Q. You do not know anything about what broke it?

A. There was nothing else to break it but the counter-weight.

Q. You do not know what else broke it, do you?

A. Not for certain. I did not see it.

Q. You knew that the counter-weight had fallen once—you knew the cable broke once and let the counter-weight down?

A. I knew the cable broke, but I did not know the counter-weight come down there or not when it was fixed.

Q. You knew if the counter-weight broke it would come down, if the cable broke? A. I expect so.

Q. You knew it had broken?

A. I expected it had; yes.

Q. You knew it would be dangerous to be underneath if it broke again, didn't you? [122—62]

(Testimony of Louis Godo.)

A. I knew it would be dangerous; yes.

Q. You knew at the time you went under there, or started to go through there, you knew the counter-weight had broken and come down?

A. I knew the cable was fixed, yes.

Q. You knew the cable had broken and the counter-weight come down, did you not?     A. Yes.

Q. And yet you went through there or tried to?

A. How?

Q. Yet you tried to go through?

A. It was fixed when we tried to go through there.

Q. You knew there had been some change made there?

A. I knew there had been a change made or they had fixed it.

Q. You knew it had been fixed. Now, what would be the simplest way to fix it?

A. Raise the weight up to its place again where it was, or else tie on to your weight where it was, and then board up the holes so that nobody could come up into dangers.

Q. Wind off the drum one wrap of the cable, and connect the cable with the weights and then wind it on, if that could be done, that is the way to do it, isn't it?     A. That is the way to do it.

Q. Yes.

A. But if you done that you ought to cover it so that nobody could get under the weight.

Q. But that is a very frequent method of repairing a break of that kind, isn't it?     A. Which.

Q. That is the natural way to repair that, isn't it?

(Testimony of Louis Godo.)

[123—63]      A. Yes.

Q. Sir?      A. Yes.

Redirect Examination.

(By Mr. TEATS.)

Q. Now, at the time you lighted your candle, were you crawling through there or what were you doing?

A. No, sir, I was standing still.

Q. What for?      A. For to light the candle.

Q. What else?

A. I did not get to light the candle. I got the match lit, but I did not get to light the candle until it struck me.

Q. Before it struck you?      A. Yes.

Q. Why did you want to light the candle?

A. So that I could see what ails that timber that was broken, or if there was any danger.

Q. Whereabouts?

A. Right there, where there was danger around me.

Q. So that you were not crawling through at this time when you got struck?      A. No.

Q. You were lighting the candle to look into the dark to see what was the matter?

A. Yes, to see what was the matter.

Q. And why this timber was broken?      A. Yes.

(Thereupon the jury was admonished and excused until 10 o'clock the following morning.) [124—64]



(Testimony of Louis Godo.)

November 26th, 1912, 10 A. M.

The call of the jury being waived, and the jury being present, the trial of this cause was continued as follows:

LOUIS GODO, being recalled, continues his testimony as follows:

Redirect Examination.

(By Mr. TEATS.)

Q. Do you know about where you were located when Pete Cornils told you to go under the wharf and make the measurements?

A. I was standing about ten feet from the corner of the new building, on the wharf.

Q. Which way?

A. To the north of the new building.

Q. Over this way?     A. Yes, sir.

Q. Somewhere in this locality? (Indicating on Ex. "A.")     A. Yes.

Q. Mark that X there, with a ring around it. Were there men working on the new building at that time?

A. Yes, sir.

Q. Who were they?

Mr. EVANS.—We object to that as immaterial.

The COURT.—Objection overruled.

Mr. EVANS.—Exception.

A. A man by the name of Hansen and another fellow by the name of Lee West.

Recross-examination.

(By Mr. EVANS.)

Q. How far was it from the tide-flats to the wharf?

[125—65]     A. Sir?

(Testimony of Louis Godo.)

Q. How far was the wharf from the tide-flats?

A. I should judge about six or eight inches; the cap is part of the tide-flats, part of the mud.

Q. I mean the platform or wharf.

A. The platform at that place would be about two feet.

Q. Two feet?      A. A little over two feet.

Q. Above the flats?      A. Above the muck.

(Witness excused.)      [126—66]

**[Testimony of J. E. Belcher, for Plaintiff  
(Recalled).]**

J. E. BELCHER, being recalled, continues his testimony as follows:

Direct Examination.

(By Mr. TEATS.)

Q. Do you know from your own memory or from information that you have gathered when the ringer foundation was built?      A. Yes, sir.

Q. From what did you gather your information?

A. From the time-book, showing what the boys were doing—I mean Godo and Olson—and from the bills we paid for material that was used in the construction.

Q. Do the two tally?

A. The forms were built just prior to the time the material was bought to build the concrete with.

Q. When was that?

A. On April 26th, 1911, we paid the Smith Cement Company— (Witness refers to papers.)

Q. That is not what I want. I want what was bought, not paid. Can you tell that from your mem-

(Testimony of J. E. Belcher.)

ory? A. No, I cannot.

Q. You have no idea, only from what the records show, and that *and that* is not an original record?

A. This is an original record; yes.

Q. How do you mean it is an original record?

A. It is an original time-book.

Q. Do you know who made it? A. I do.

Q. Did you make it? A. No, sir.

Q. I do not care for information from that source. I did not [127—67] know but what you had some payments—

The COURT.—Ask about something you do care about then.

Mr. TEATS.—That is what I am asking right now, when it was made; that is what I care about. I do not care about any information gathered that is second-handed stuff, if the Court please.

The WITNESS.—That is all I can give you at any event.

Q. So that you do not know when that was built?

A. I do not; no.

Mr. EVANS.—The time-keeper who kept this record, Mr. Lungren, is outside, and if Mr. Teats cares for the information he can get it from him.

(Witness excused.) [128—68]

**[Testimony of Nels Olson, for Plaintiff.]**

NELS OLSON, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. Where do you live? A. 4138 South J.

(Testimony of Nels Olson.)

Q. What is your business?     A. Carpenter.

Q. How long have you been working at the carpenter trade?     A. About 11 years.

Q. Were you working for the Carstens Packing Company in May, 1911?     A. Yes, sir.

Q. How?     A. Yes, sir.

Q. Who were you working with during May 27th, 1910?     A. Louis Godo.

Q. The plaintiff in this case?     A. Yes, sir.

Q. Look at this Identification "A." I will ask you whether you recognize the ground floor and tide-flat situation there by that map.

A. It is the mud-flat, I guess.

Q. Did you assist in making the form for the ringer platform?     A. Yes, sir.

Q. Who did you assist in it?     A. Louis Godo.

Q. Whereabouts did you get under the building?

A. From the front of the old building.

Q. How? [129—69]

A. From the front of the old building.

Q. What were the conditions under there?

A. Oh, it is nothing but mud and water and filth.

Q. How far below the joists is the flats around south of the elevator-well?     A. I do not hear.

Q. How far below the building was the flats south of the elevator-well?

A. I should judge about four or five—about five feet underneath there. I would not say for sure.

Q. Do you remember when you went in there to fix the form—do you remember when that was?

A. It was some time in April, I think. I cannot say the exact date.

(Testimony of Nels Olson.)

Q. 1911—April, 1911?      A. Yes.

Q. Were there any other men there at that time?

A. They had a few helpers down in there.

Q. What were they doing?

A. They were cleaning out the mud and filth.

Q. From where?

A. From the foundation; fixing the foundation.

Q. From the foundation, that is where you were going to put the foundation?

A. Yes, the ringer, making a hole, digging a hole there for the ringer.

Q. And how do they do that?

Mr. EVANS.—I do not think that is material, and object to it as immaterial.

The COURT.—Objection overruled. [130—70]

Mr. EVANS.—Exception.

A. Why, they had planks down to keep the dirt from getting back into the hole.

Q. They were doing what?

A. Well, they bailed out all the slush into the box and it went off through the building somewhere. I could not say where.

Q. Which way did the box go?

A. It went towards the northwest corner of the glue-house.

Q. Along about where you see these two lines, along in that direction?

Mr. EVANS.—We object to that as leading.

The COURT.—Objection sustained.

A. The northwest corner of the building.

Q. Could you tell about which way they were—



(Testimony of Nels Olson.)

towards the northwest corner of the building?

A. Yes.

Q. That is over in this direction? A. Yes.

Q. Do you remember when you were there waiting for the water and filth to be taken out of this hole preparatory to putting in your forms, or the forms for the cement foundation, what you and Godo did?

A. We were sitting on the end of that box there when they were working there.

Q. Which end? A. The upper end of it.

Q. What do you mean by the upper end?

A. At the end where they poured their slush in it.

Q. That is the southeast end? [131—71]

A. Yes.

Q. How were you sitting as to Godo?

A. I cannot remember how we were sitting. I know we were sitting on the side of the box there.

Q. Were you ever under there before?

A. No, sir.

Q. Now, at that time I will ask you whether or not the new addition was being built.

A. No, it was not built at the time we fixed the ringer.

Q. What were you doing on the 27th day of May, the day of the accident to Mr. Godo?

A. We were working on some 3 by 12's. I think they werè for piling, for a dam out there.

Q. And where were you working?

A. North of the new part of the glue-house.

Q. North of what?

(Testimony of Nels Olson.)

A. The new part of the glue-house.

Q. Did you have occasion to go under the building that day, under the new part?

A. Not until the time Louis got hurt.

Q. At the time Louis got hurt were you working with him?      A. I was working with him.

Q. How did you happen to go under there with him?

A. He had a pole in his hand and I asked him when he could take,—

Mr. EVANS.—We object to that.

Mr. TEATS.—It is part of the *res gestae*.

The COURT.—The objection is sustained about the talk. Tell what they did.

Q. Just tell what you did and what he did and what you were [132—72] going to do. I think it is part of the *res gestae*, anyhow, if the Court please.

A. We were working on them piling, and it was about, I could not say whether it was four o'clock or not. It was in the afternoon and Pete came along and called Louis off. They were going to put in the tank, and they went over in the direction of the stair-way where the tank sets in there, and I went in the blacksmith-shop or carpenter-shop with our tools, and when I came back again Pete Cornils had gone, and I asked Louis, I say,—

Mr. EVANS.—We object to that.

The COURT.—The objection sustained in regard to what the plaintiff told him.

Mr. TEATS.—Q. Just tell what you did.

A. I came back again and Louis had a pole in his

(Testimony of Nels Olson.)

hand, and I said, "Where are you going"—(interrupted).

Mr. EVANS.—I object to that.

Mr. TEATS.—I think that is part of the *res gestae*.

The COURT.—The objection is sustained. You are only asked to tell what you did. The Court has asked you a couple of times not to tell what Godo told you.

A. We went underneath the building at the corner of the new part and the old part of the glue-house.

Q. Whereabouts did you go under? Look at Identification Number 2.

A. We went under right here.

Q. Where that blue mark is? A. Yes, sir.

Q. The triangle? A. Yes, sir. [133—73]

Q. Which went in first—you or Godo?

A. I cannot remember who went in first. I think Godo went in first and I followed him.

Q. Then what did you do when you got in there?

A. I think Louis lit a candle and I had my back to him, and when I turned around I seen him on his hands and knees going through the hole where the elevator-shaft or weight comes down. When I turned around I seen the weight go down on top of him. I ran out there and hollered to get hold of the elevator rope, and somebody did up above at the same time and pulled the cable and got the elevator coming down again, and when I got down underneath again Louis was sitting on the inside of the hole, and I crawled through and asked him if he was hurt very bad; "Take me out," he says, and I took him around

(Testimony of Nels Olson.)

—around the timber and brought him out.

Q. Look at Exhibit “A.” Which way did you take him out?

A. Took him around this way, around this way. It was boarded up here, and we come around there and come up through there (indicating on plat).

Q. Make a mark about the course you went.

(Witness does so.)

Q. Where was it boarded up?

A. In here, a few boards in there. I know I took him around there. I do not remember just how it was. I took him around.

A JUROR.—Where did you say the boards were?

A. Here, right along here.

Mr. TEATS.—Q. Now, when the weight came down on Mr. Godo, in what position was he? [134—74] A. When he got underneath?

Q. Yes. When you turned around and saw the weight strike him, in what position was he, can you describe that to the jury?

A. He was sitting down just about like this. (Illustrating.)

Q. That was after the weights were taken off?

A. Yes.

Q. I mean when the weight hit him.

A. He was down on his knees crawling through the hole.

Q. While the weight was on him?

A. When the weight came down he was just squashed down like that, you know.

Q. How near to the ground was he squashed down?

(Testimony of Nels Olson.)

A. There is a timber that is broken off there where it goes underneath there, and I guess his face was right down in the mud, and the weight got on top of him.

Q. Who helped you take him out?

A. I do not know the name of the fellow. Carroll, I think his name is.

Q. Carroll? A. Yes.

Q. Did Mr. Hansen help take him out?

A. I remember he was right there when I got out from underneath the building.

Q. Now, when you went in after lifting the elevator-weight off of him, where was Louis?

A. He was in the hole.

Q. How?

A. He was underneath the glue-house.

Q. How far from the hole? [135—75]

A. Right at the hole; his feet was just about at the hole.

Q. Which way did you go to him?

A. I crawled through the hole.

Q. Why didn't you go there around some other way?

Mr. EVANS.—I object to that as immaterial.

The COURT.—The objection is sustained.

Q. Could you have reached him any other way?

Mr. EVANS.—That is objected to for the same reason.

The COURT.—The objection is overruled. It goes to the conditions.

Mr. EVANS.—Exception.



(Testimony of Nels Olson.)

A. No, I never thought about it, never come in my mind. I was excited when I seen him hurt there.

Q. Where was the elevator-weight when you went in to help him out? A. Up at the top.

Q. Top of the building?

A. Yes; the elevator was down and the weight was up.

Q. When you went in there what was the condition of the ground in west of the elevator-well?

A. Pretty muddy in there.

Q. What was it as to filth?

A. Well, it is mud and water.

Q. What else?

A. That is all I can remember of.

Q. How deep was that mud—did you get into it?

A. I do not know how deep it was. I stepped in there over my ankles.

Q. After you got him out what did you do?

Mr. EVANS.—I object to that as immaterial what he did after [136—76] he got him out.

The COURT.—You understand, just what you did in connection with the plaintiff.

The WITNESS.—After I got him out I took him over to the lumber pile and went and got some water for him.

Q. Where was the lumber pile?

A. Just about where we were fixing them planks.

Q. To the north of the new addition? A. Yes.

Q. Then what did you do? What condition was Godo in when you first found him over here under the glue-house?

(Testimony of Nels Olson.)

A. Why, he was sitting up and he was grunting and he was bleeding through the nose.

Q. What condition was he in when you took him out?

A. Well, groaning and complaining that he was hurt.

Q. Could he walk—could he crawl?

A. No, I dragged him out.

Q. Then when you got him outside the new building could he walk?

A. No, he could not walk. We helped him along.

Q. To the lumber pile? A. Yes.

Q. Then what did you do after you got him some water? A. I think I went to my work.

Q. Who was there to attend to him?

A. Oh, Pete Cornils, and Charlie Lundgren, the superintendent, and quite a few others. I cannot just think of them, who they were.

Q. How long were you at work on the form for the ringer foundation? [137—77] A. Two days.

Q. Both you and Godo? A. Yes.

Q. When you went in there whereabouts were you bound for?

A. I did not know where I was bound for.

Q. How did you work then—under whose orders did you go?

A. Well, I was working partly with Louis.

Q. Louis would take the orders and you would follow the orders from him? A. Yes, sir.

Q. Now, at the time he went in there what, if anything, did he say before he went to that hole where

(Testimony of Nels Olson.)

the counter-weights came down?

Mr. EVANS.—We object to that as immaterial.

The COURT.—Objection sustained.

Mr. TEATS.—It is part of the *res gestae*.

The COURT.—Objection sustained.

Mr. TEATS.—Save an exception.

The COURT.—Exception allowed.

Cross-examination.

(By Mr. EVANS.)

Q. You testified there was a broken beam of plank there; that was the mudsill at the bottom down here, wasn't it?     A. Yes.

Q. The broken plank was this one (indicating on exhibit)?     A. Yes, the beam piece.

Q. The one underneath here (indicating on exhibit)?     A. Yes.

Q. And you went under there and Godo was ahead and he got [138—78] down on his hands and knees to crawl through?     A. Yes.

Q. And he crawled out there and started through?     A. Yes.

Q. You never had gone under that building from that direction before, had you?     A. No, sir.

Q. Now, with the exception of the ringer foundation and elevator-well and foundation of the tank or something way over in here, that packing-house is all open in there, is it not—all open under the glue-house?

A. I guess it is; it is open where we were.

Q. It is open all around through this part of it (indicating)?     A. Yes.

(Testimony of Nels Olson.)

Q. Did you notice or observe the conditions around there when you went under that day with Louis?

A. No, I never.

Q. I show you Defendant's Exhibit 4. Do you recognize that piece there—what is that?

A. That is the counter-weight.

Q. Is that the space you crawled through?

A. Yes, sir.

Q. Did you notice the place on either side of it?

A. No, sir.

Q. Do you know whether or not there was a space there? A. No, I could not say.

Q. Have you ever been back there?

A. No, sir.

Q. Did you observe—

A. Not until after he was hurt. [139—79]

Q. Was there a space there afterwards that you noticed? A. I did not notice it.

Q. Right ahead here where figure 4 is on the exhibit, was that open right through there? A. Yes.

Q. I will call your attention to Number 3, and call your attention to Mr. Alstrum sitting in there. Is that the condition it was in that day?

A. It seems like there was a few boards in here (indicating).

Q. A few boards in here?

A. In here; I took Louis around here through this way.

Q. Louis was on the other side of that?

A. Yes.

Q. But this place was open?

(Testimony of Nels Olson.)

Mr. TEATS.—I object to that, as interrupting the witness.

The WITNESS.—I took Louis around.

(Question repeated.)

A. He was in here. I got through here (indicating).

Q. You took him around through these beams there? A. Yes.

Q. Around through where the picture of Alstrum is? A. Yes.

Q. There is nothing to hinder, when you first went in there, in going through where you see that figure 3 is to where Alstrum is in the picture?

A. I could not say. I never paid any attention to it.

Q. You do not remember about that? A. No.

Q. That packing-house was all open under there with the exception of the shaft? [140—80]

A. Yes.

Q. Now, as a matter of fact, it was muddy all underneath there, wasn't it? A. Yes.

Q. And wet? A. Yes.

Q. And most any place you stepped down you got in the mud, and got in pretty deep in some places?

Mr. TEATS.—He said yes; nodded his head.

The COURT.—Sometimes you nod your head and don't speak, and sometimes the jurors might not be looking at you. Court proceedings are carried on in the English language and not by sign language.

Mr. EVANS.—Q. How long had you been there at



(Testimony of Nels Olson.)

the packing-house, how long had you worked there?

A. I have been working there once before.

Q. Did you ever know of anybody going under that packing-house at the place you went under?

A. No, sir.

Q. Did you ever know of anybody going under there and under these counter-weights too?

A. No, sir.

Q. Did it have the appearance of anybody having gone in there, that you can tell?

Mr. TEATS.—We object.

A. No, sir.

Mr. TEATS.—We object.

The COURT.—Objection overruled.

Q. What was the answer?

A. No, sir. [141—81]

Q. Now, when you came out, you and these other men brought Mr. Godo out, you said that you met Pete Cornils? A. He was right there.

Q. And Charlie Lundgren?

A. Yes, that was after.

Q. Was there anything said there at that time?

Mr. TEATS.—We object to that.

The COURT.—Objection overruled.

Q. Was there anything said there at that time?

A. Pete said, "For God's sake! Why didn't you tear up the planks instead of going underneath the building?" Pete said to him.

Q. That was when you brought him out from under the building?

A. After he was sitting on the plank.

(Testimony of Nels Olson.)

Mr. TEATS.—I move to strike that out as immaterial and self-serving, and not shown that it was addressed to the plaintiff when he was in a condition he could understand.

(Discussion.)

The COURT.—It is a matter the jury will understand was directed to the plaintiff himself. What reply the plaintiff made might be pertinent, but the jury will at the same time take into consideration the condition the plaintiff was in, in regard to whether he could make an intelligent answer.

Q. Did Godo say anything in answer to that?

A. I cannot remember that he did.

Q. Did you talk to Godo there at the time?

A. Yes, I talked to him.

Q. Did he ask you for a drink of water?

A. No, I went and got the water. [142—82]

Q. Did he talk to you, you say?

A. No, he did not say much.

Redirect Examination.

(By Mr. TEATS.)

Q. He didn't even respond to what Pete said, you said? A. No, sir.

Q. He was too sick? A. I guess so.

Q. He was in a semi-conscious state, was he?

(Question objected to, and objection sustained.)

Q. You are working for the company yet, aren't you? A. Yes.

Q. And you have been in these lawyers' offices a good deal talking about the case?

A. I was up there once.

(Testimony of Nels Olson.)

Q. Now, when you answered the question as to whether or not the ground there had the appearance of anybody being down there or going through there, what did you mean?

A. I did not notice anybody going through there.

Q. You did not notice anybody going through?

A. No.

Q. If anybody had walked through there you could not have seen the tracks, could you?

Mr. EVANS.—We object to that as cross-examination of his own witness and not proper redirect examination.

A. I have never noticed.

The COURT.—The objection is overruled. It is leading. You have the right to get at the condition. The object will be sustained on the grounds it is leading. You suggest by [143—83] the mere form of your question what answer you desire.

Mr. TEATS.—Now, you say that you have not been under there since?

Mr. EVANS.—Objected to.

The WITNESS.—No, I did not say that.

The COURT.—It is preliminary; objection overruled.

Q. You did go under there since the accident, did you not? A. Yes, sir.

Q. And look at this Exhibit No. 3. Look at No. 4. Now, when you went under there did you notice any openings here as marked Number A and B in photograph No. 4? A. No.

Q. What did you go under there for?

(Testimony of Nels Olson.)

A. I do not know what I went under there for at the time he was hurt.

Q. No, afterwards?

A. Went and boarded up this hole here.

Q. Did you board up this hole?

Mr. EVANS.—I object to that as immaterial, and move to strike both the question and the answer on the ground that it is a change made in the premises after the accident, and has nothing to do with the accident in controversy in this case.

The COURT.—Objection sustained as to this question, but as the former answer may bear on the photograph the motion will be denied.

Q. Did you pass in through here under the glue-house at all when you went under there the second time?

A. I went out here and,—let's see. Here is where I went under the second time, and I boarded up this front side first, and then I went around here and boarded up this other side. [144—84]

Mr. EVANS.—I move to strike that as immaterial. This was after the accident, and when some boarding was put up is incompetent, irrelevant and immaterial.

Mr. TEATS.—His answer is clearly material, because he said when he went there he followed around here through this way to the right, instead of going to the left.

Mr. FLETCHER.—It is not what he did, but what the conditions were at that time.

The COURT.—The objection is sustained and mo-

(Testimony of Nels Olson.)

tion granted, and the jury instructed to disregard that answer. If he made some alterations there that may bear on the photograph as indicating what the condition was before, he may state, but what his work called him to do and how he got around there afterward has nothing to do with this case.

Q. How long was it after the accident you went in there? A. I could not remember.

Q. About how long?

A. I have no idea how long it was after that.

Q. How large was this space where the counter-weight fell there?

A. I did not measure it. I do not know.

Q. You know you were there?

A. I know I was there.

Q. Big as that door back of you (indicating door in courtroom)? A. No.

Q. Big as the panel back of you in that door?

A. I do not know how large it is.

Mr. EVANS.—That is objected to as to the form of the question. [145—85]

The COURT.—The objection is overruled.

Mr. EVANS.—Exception.

Q. Could you say whether a man could go through there without getting on his hands and knees?

A. I could not say.

Q. Well, you went through there?

A. Yes, I went through there.

Q. Did you get down on your hands and knees or walk through?



(Testimony of Nels Olson.)

A. Got down on my hands and knees and crawled through.

Q. Was it necessary to go through to get on your hands and knees, or could you get through there in a stooping position?

A. I believe a man could stoop and get through there.

Q. Look at Number 4 and the space above the figure 4. My understanding is you found Godo toward the space where the weight came through.

A. Yes.

Q. And then you took him around to the south—

A. Yes.

Q. Of the timbers?      A. Yes.

Q. Now, what was in this space at that time, if anything?

A. Seems like there were a few boards up and down in here (indicating).

Q. A few boards up and down between the big timbers at the space where figure 4 is and above that space?      A. Yes; right in here.

Q. Just indicate where that is on the map.

A. Just about like this from here over to there (indicating on the plat). [146—86]

Q. How many boards?

A. I could not say how many boards.

Q. Do you remember who was present when you heard Pete say something about why didn't you take up the plank on the wharf? Who was present then?

A. I cannot remember who was present.

(Testimony of Nels Olson.)

Recross-examination.

(By Mr. EVANS.)

Q. I want to ask you if, as a matter of fact, the boards you testified to here by the figure 4, if they are not further down by the other end of the space.

A. Down in this space?

Q. Down to this end, this end of the beam, instead of up here?     A. I cannot remember that at all.

Q. Would you be positive there were any boards there?     A. It seems to me like there is.

Q. Are you sure?     A. Yes, I am sure.

Q. How many boards are there?

A. I could not say how many boards there were there.

Q. Was there one or two or three?

A. I could not say.

Q. Could you say there was one?     A. Yes.

Q. Was there two?

A. I know I took him around this here.

Q. You took him around there. There was a big open space right there, wasn't there?

A. Yes. [147—87]

Q. You could have brought him through there and brought him out the way you went in if you wanted to, couldn't you?

(No answer.)

Q. When you went under there to work, when you were building that ringer foundation, as a matter of fact it was about five feet and six inches from the mud to the floor?     A. I would not say for sure.

Q. You had plenty of room to work?     A. Yes.

(Testimony of Nels Olson.)

Q. Plenty of room all around clear under there?

(No response.)

Q. Now, as to the space here, what is the height here, right here by this figure 4, from the mud?

A. Six or seven feet right in here. I would not say that it was seven. I would say that it was about five or six feet.

Q. How wide was the space between these two timbers, one marked 4 and one marked with 2X?

A. I could not say how far.

Q. Approximately between these two how high, was it? A. Oh,—

Q. Four feet? A. Something like that.

Q. Was it more than four?

A. I would not swear to it.

Q. You think it was about four? A. Yes.

Q. Now, when you get through that four, the place that we have indicated by 4 and 2X, and then inside of that, it was from five to six feet, five and a half feet? [148—88]

A. I would not say how wide it was in there?

Q. The ringer is right in there, isn't it?

A. No, the ringer is over this way.

Q. It was just about the general condition under the whole thing; there is not much slope there.

A. I did not pay much attention to what form the ground is in there.

Q. But there is room to walk around all of that?

A. Yes.

Q. And that applies clear back to the back end, clear back to the elevator shaft, does it, or do you

(Testimony of Nels Olson.)

know what the condition is back there?

A. No, I was not in there.

Q. I will ask you if, as a matter of fact, Mr. Clark was not present at the time Mr. Cornil made the remark you testified to after Mr. Godo was hurt?

A. I could not say for sure now whether he was there or not.

Q. Do you remember seeing him around there at that time?

A. I could not say for sure whether I did or not.

Q. What is your best judgment—did you see him around there at the time of that accident?

A. I cannot remember. I was excited after the accident. I did not pay much attention to anything.

Q. Now, Mr. Olson, Mr. Teats asked you what you did after that. You went and took that plank up on the outside and took the measurements, didn't you?

A. Yes.

Q. Right after Godo was hurt?

Mr. TEATS.—We object to that as not proper cross-examination.

A. I do not know what time it was after. [149—89]

The COURT.—Objection overruled.

Mr. TEATS.—That is not cross-examination as to what he did, after coming out and making a tank.

The COURT.—Objection overruled.

Q. You wanted to find this timber to rest the tank on, didn't you? A. Yes, sir.

Q. You took the plank up right there, didn't you? (Indicating on the photograph.) A. Yes.

(Testimony of Nels Olson.)

Q. Took your measurement and set that in there?

A. Yes, sir.

Mr. TEATS.—We object.

The COURT.—Objection overruled.

Q. You discovered when you came to cut that wharf away the foundation of the packing-house, this side here, run clear down to the mud, didn't you?

A. Yes, sir.

(By Mr. TEATS.)

Q. You did not know it before when you went in there to make this measurement, did you?

A. No, I never knowed it.

Q. Who took out the plank?      A. I did.

(Witness excused.)    [150—90]

**[Testimony of W. M. McArthur, for Plaintiff.]**

W. M. McARTHUR, a witness called for and on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. Where do you live?

A. 3601 East K street, McKinley Park.

Q. What is your business?

A. Well, carpenter work and millwright work.

Q. How long have you been working at that work?

A. Well, I have been working at that work somewhere along about two and a half or three years; somewhere, millwright work.

Q. Did you ever work for the Carstens Packing Company?      A. Yes.

Q. When did you work for them?



(Testimony of W. M. McArthur.)

A. I worked there—I got laid off there, I think it was somewheres along last April.

Q. When did you first commence working for them?

A. Excuse me a minute. Let me study just a moment. No, it was in February—either February or March that I got laid off there.

Q. 1912? A. Yes, sir.

Q. When did you first commence working for them?

A. Well, I don't just remember the date when I commenced working for them. I worked for them somewheres along about three years—two and a half or three years.

Q. All the time?

A. Yes, sir; from the time I commenced working at all for them. [151—91]

Q. Who was your foreman?

A. Well, Charlie Lundgren was our foreman, and Mr. Cornils, I suppose, was master mechanic.

Mr. EVANS.—I object to what the witness supposes.

Q. Who gave you orders for work?

A. Well, sometimes Mr. Lundgren gave it to us and sometimes Mr. Cornils.

Q. With whom were you working?

A. Well, I was working from the time with Mr. Beyer after he came there.

Q. After he came there?

A. Yes, after he came there. I was working there when he came.

(Testimony of W. M. McArthur.)

Q. What part of the plant did you work on?

A. Well, we were working all over the plant. We were all over the plant.

Q. Do you remember of the cable or counter-weight of the elevator at the glue plant, the glue-house, breaking? A. Yes, sir.

Q. And who repaired that?

A. Mr. Beyers and myself.

Q. And where did that counter-weight run?

A. Well, it run down through the building close to the elevator shaft.

Q. Which side of the elevator shaft?

A. Well, it went on the south side of the shaft.

Q. The southwest corner, was it?

A. What I mean by the shaft is the well-hole where the elevator comes down.

Q. And the counter-weight run outside of the shaft?

A. Yes, it run on the outside of the well-hole.  
[152—92]

Q. Now, do you know where the weight stopped when it was down below at rest before you repaired it? A. Before I repaired it?

Q. Yes. A. It stopped even with the floor.

Q. And when it broke what became of the counter-weight? A. You mean when the cable broke?

Q. Yes. A. Dropped down into the mud.

Q. Whereabouts?

A. Well, I should judge it broke about six or eight inches above the eye in the counter-weight.

(Testimony of W. M. McArthur.)

Q. What was about the weight of that counter-weight?

A. I do not know. It weighs somewheres along about, I should judge, eighteen hundred pounds. Of course, I would not be positive, because I ain't never,—

Q. About how long was the pieces of the weights? It is made up of individual weights, isn't it?

A. Yes, individual weights. They are somewheres about two feet long, to the best of my knowledge.

Q. Connected together?

A. Well, they are connected together, yes; they are connected together with rods.

Q. How do they run—up and down? What do they run up and down between?

A. There is a guide. In the end of the counter-weights there is a slot or slotted notch holed out, cut in there so that they run down the slide just the same as running along that (indicating and illustrating); they are slotted in so that when they get down the guide they [153—93] follow the guide right straight down, so that they are supposed not to get out of the guide.

Q. Now, after the cable broke, what did you do first about repairing it?

A. Well, the first thing we done was to get that counter-weight up out of the ground; we could not do anything else.

Q. Whereabouts were they?

A. Well, they were down in the mud in the bottom of the track.

(Testimony of W. M. McArthur.)

Q. Look at Number 3; do you recognize that as the place?

A. No, that does not look like the place to me.

Q. Look at Number 4; does that look like the place?     A. No, sir, it does not.

Q. Now, look at the map here, A, at the time you went in to repair this was the new addition on?

A. No, sir; it was not.

Q. Whereabouts did you go and which way did you go to get to the weights then in the mud?

A. At the time we repaired the counter-weights we went in from the west side, as I should call it, next to the railroad track from the west side, on the south side of the platform we run down. There was an incline run down from the platform down where they run trucks down.

Q. Little door there?

A. There was a door there; yes, sir.

Q. Now, we will say this is the door here on this map. Which way did you go to get to the counter-weight?

A. We passed in from the west side, from the west side, and come right in here and got over the sill and come in here and then we come in here; that is, to fix the counter-weights [154—94] (witness indicates on Identification).

Q. Can you trace the line here?

(Witness does so.)

Q. Do you recognize this as representing about the situation?     A. Yes.

(Testimony of W. M. McArthur.)

Q. This represents the platform and this is the little door?

A. This platform did not run in—well, was this line here? This line of the building run all along here. This is the line of the platform and this is the little door we went in here, and we went in here and went through here and got right through here and crossed the main—

Q. Make a blue line where you went.

A. We entered at this little door right here, got right through here, crossed over this sill and got over here to the counter-weights. The counter-weights lay down in here.

Q. In the mud there?

A. They were right down there in the mud, right at that place. This is the hole, and the counter-weights dropped right down through here, and we had to get right in this hole and get over this hole and get in here and fix these counter-weights. And when we got in here we would fix it.

Q. What was the condition of the ground along in under the platform?     A. Well, it was muddy.

Q. We will call this mark you made “McArthur.”

Mr. FLETCHER.—Mark that other line Olson.

Mr. TEATS.—And over here is “Godo.”

Q. What was the condition of the ground under the platform [155—95] and up to the place where the weights went into the mud?

A. Well, it was all muddy and watery and mirey in there. We had to put plank down in order to walk.



(Testimony of W. M. McArthur.)

Q. Where did you put down plank?

A. Well, we put down plank along from that timber, the center timber that ran through the building there across to the hole, and on the other side also because we worked on both sides of the counter-weight.

Q. Was there a space here where the counter-weight was?

A. Of course we could pass through there. The counter-weights were down and we passed through there.

Q. How large a space was that?

A. I should judge two feet. I didn't never measure it. I suppose it was about two feet wide where the counter-weights come down.

Q. And how high?

A. It was about three; between three and four feet from the joist down to the mud. I knew we had to stand this way when we were down under there (illustrating). We could not straighten up under there.

Q. In a stooping position, about half?

A. Just about half, I guess. I never measured the distance.

Q. Now, what did you do in repairing the weight?

A. Well, we *go* the weights up out of the mud, we blocked them up underneath, took some blocks and blocked them up underneath in order so as to hold them there until we could fasten on to the eye of the upper counter-weight. Well, then, we had to go, in order to get length enough, we had to go to work and take a turn off the drum up at the elevator where

(Testimony of W. M. McArthur.)

the cable is wound around. [156—96]

Q. How much of a wrap of cable did you use in making the splice?

A. Well, I should judge about eight or ten inches.

Q. And after you made the splice did you notice where the weight ran down? A. Yes, sir.

Q. How far down would it run?

A. Well, it come within about eight or ten inches of the cross-piece below.

Q. Cross-piece below?

A. Yes. It had been—of course, it had been broken down on account of the weights coming down.

Q. Who gave you your orders to make that repair?

Mr. EVANS.—We object to that as immaterial.

Mr. FLETCHER.—Mr. Godo is not connected with this in any way; it is independent work.

The COURT.—Objection sustained.

Mr. TEATS.—On what ground.

The COURT.—It is too remote. It might possibly have some bearing on the case and then again it might not.

Q. I will ask you whether or not Mr. Cornils, the master mechanic, knew of your making these repairs.

Mr. EVANS.—We object to that as leading, suggestive, incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. TEATS.—On that ground, that is asking whether he knew or not. Note an exception.

Q. While you were making these repairs was Mr. Cornils around?

Mr. EVANS.—Objected to as immaterial.

(Testimony of W. M. McArthur.)

The COURT.—Objection sustained. [157—97]

Q. About when did you and Mr. Beyers make these repairs?

A. Well, to the best of my knowledge it was in the latter part of April or 1st of May. That is the best of my knowledge.

Cross-examination.

(By Mr. EVANS.)

Q. If the time-book shows it was in January, you would not be positive, then, would you, Mr. McArthur? A. What is that?

Q. If the time-book of your time shows that that change was made, that repair was made in January, then you will say that you are mistaken about it being April or May, wouldn't you?

A. I do not know. I do not know whether I would remember or no.

Q. You saw the time-book there, did you not?

A. I did not see it, no. I did not see the time-book myself, no, sir. I did not look at the time-book.

Q. Who were you working under the time you made that repair?

A. Under who was I working under, do you say?

Q. Who was your boss that day?

A. Why, the boss we *always when we wanted*—Charlie Lundgren or Pete Cornils; did not make any difference which one. Of course they both gave orders, but at that time, if I remember right, Mr. Lundgren gave us orders to fix the elevator. I would not swear to it, positive, but I think to the best of my

(Testimony of W. M. McArthur.)

knowledge he was the man who gave us the order.

Q. I will ask you if you went over to the packing-house a [158—98] day or two ago and had a talk with Mr. Belcher.

A. I was over to the packing-house; yes.

Q. Did he not show you that book?

A. No, he did not show it to me. He did not give it to me.

Q. Didn't you look at the book?

A. No, sir, I did not.

Q. Didn't he show you the time in January?

A. No, sir; he had the time but he never showed it to me.

Q. He stated it to you from the book? A. Yes.

Q. You said if the time-book says that it must be so? A. I might have said so; yes.

Q. You told him at that time you were not positive when this was made?

A. I told him I was not positive whether it was the last part of April or May.

Q. Did you ever have it before?

A. No, sir, I never seen the time-book; never had it in my hands.

Q. He did not hold it up where you could have seen it?

A. No, sir, he had the time-book in his own hands.

Q. Mr. Lundgren kept the time, didn't he?

A. Yes, sir; Mr. Lundgren is supposed to keep the time, yes, sir.

Q. He had a book of this kind?

A. Yes, I suppose he had. We gave him our time

(Testimony of W. M. McArthur.)

as to work, and I suppose there is the book he put it in. I could not say positive.

Q. When you would give him the time he would put it down, wouldn't he? [159—99]

A. He was supposed to put our time down.

Q. Did he?

A. I could not tell you. I do not know whether he did or not.

Q. Do you know his handwriting?

A. No, sir, I am not acquainted with his handwriting; I never paid any attention to it.

Q. When was the new building put up, the new addition? A. The new addition?

Q. Yes.

A. Well, that new addition, I think, was put in along in May.

Q. In May? A. Yes.

Q. You don't know whether the repairs were made in April or May?

A. I am not positive. They were in the latter part of April or 1st of May.

Q. But it was before the new addition was put up?

A. Yes, sir; it was before the new addition was put up.

Q. How long before, according to the best of your recollection?

A. Well, I think that new addition was put up the forward part of May, if I am not mistaken; well in May.

Q. How long before that was it you made this repair?



(Testimony of W. M. McArthur.)

A. I could not say; we were repairing over there, all over the shop.

Q. It is largely a question of guess with you as to the time?

A. Well, I was judging. I was saying to the best of my knowledge it was the last of April or first of May, the best I can remember that day.

Q. To the best of your knowledge? [160—100]

A. Yes.

Q. Can you remember the month you did any other specific work there?

A. No, I cannot, because I never paid much attention to the work we did, because we were all over everywhere.

Q. You testified that counter-weight was down in the mud? A. Yes, sir.

Q. Underneath the counter-weight was a mudsill or plank, heavy plank, wasn't it?

A. There was a plank along there; yes, sir.

Q. The counter-weight when it broke and the cable broke ran down on the guides? A. Yes, sir.

Q. And struck that plank?

A. Yes, sir, struck that plank.

Q. And broke it? A. Broke it, down through it.

Q. But part of the counter-weight was still up here on the guides?

A. No, sir. The counter-weights was right down into the mud, with the exception of two. There were two counter-weights that were on top of the mud.

Q. Two of the sections were still up there?

A. Two of the sections were still up there, but they

(Testimony of W. M. McArthur.)

were not in the guides; they were clean down out of the guides.

Q. They were?      A. Yes, sir.

Q. There was not any broken joist above the counter-weight at all?

A. No, sir, I do not think there was. I would not say that [161—101] there was.

Q. Say this is the floor up here (illustrating), and then the guides come from here down; there is a joist up there?      A. Yes, sir.

Q. That was all right?      A. Yes, sir.

Q. And the only thing that was broken was the one where it hit down here?      A. Yes, sir.

Q. Did you make any memoranda as to the time that you did that work?

A. No, I never keep any memoranda at all.

Q. Just a matter of recollection?

A. Recollection, the best I can recall. I never tried to keep any time at all.

Q. Might have been a few weeks earlier or later, and you could not swear to that?      A. Sir?

Q. Might have been a few weeks later or earlier?

A. I would say it was either in the latter part of April or the first of May, to the best of my knowledge.

Q. How are you able to fix the latter part of April or first of May—what makes you fix that time?

A. On account of the time we put up that new building; that is what I am going from.

Q. How long was that before that?

A. Yes, sir.

Q. How many weeks before?

(Testimony of W. M. McArthur.)

A. I could not say positively.

Q. How does the putting up of that new building enable you [162—102] to fix the time?

A. On account that I knew the new building was put up by that time, and I knew it was just before the new building was put up we fixed the counter-weight.

Q. How long before, approximately?

A. Well, I have said I would not undertake to say the date for I cannot.

Q. You do not know when that building was put up?

A. No, I could not say the date the building was put up; it was put up in May.

Q. In May?

A. Yes, sir; sometime in the fore part of May.

Q. In the fore part of May?      A. Yes.

Q. Was it a week or two weeks or three weeks or five weeks, you think, before you did that work?

A. I cannot say it was a week or five weeks or not.

Q. It may have been as far back as February, as far as you know?      A. No, I do not think it was.

Q. You would not say that it was not four weeks back?

A. I would say just as I said before, either in the latter part of April or forepart of May.

Q. (By Mr. TEATS.) What would you say as to that repair being done in January?

A. Well, I do not think it was done that time. I think it was done later. I think it was done just as I said, either in April or May.

(Testimony of W. M. McArthur.)

Mr. EVANS.—Q. That is just a think; you do not know?

A. Well, I say in the best of my knowledge; yes, sir. [163—103]

Q. There is one other question I wanted to ask you; how many times had you seen these counter-weights below the floor before you went down there to repair it?

A. How many times had I saw them below the floor?

Q. Yes. A. I never seen them below the floor.

Q. Had you been in there before to see them?

A. Well, I had been down. I was down under that building not so awful many times, but two or three times before.

Q. Did you observe the counter-weights at that time?

A. Yes. When I went down there I could not help but observe them, because I went down there to see if they were there all right at the times. What I mean is,—listen now,—the guides that run the elevator, the guides that the counter-weights come down on.

Q. How many times while you were underneath did you see the counter-weights operate?

A. Oh, I could not say as to that. I could not say as to the amount of the times that they operated, but I have seen them going up and down there several times, and I would not say as to how many times.

Q. You can see them by looking up there, could you?

(Testimony of W. M. McArthur.)

A. You can see them by looking up, yes; if you got down in there to look up you could.

Q. Now, as a matter of fact, if the elevator did not run just steady, then the counter-weights go a little lower as your elevator goes higher?

A. Yes, certainly; if the elevator does not go clean up the counter-weight does not come clear down.

Q. If clear up and it jiggles a little at the top, the weights [164—104] will go down further?

A. If the elevator goes to the last floor, the counter-weights will go down as low as they are supposed to go.

Q. Did you notice at the time you made the repairs there whether it showed on the track or guide where the counter-weights used to run to?

A. Not down below the floor, it did not.

Q. Not at all? A. No, sir.

Q. Not an inch?

A. No, not down below the floor; it did not come down below the floor.

Q. The guides extended right straight down?

A. It does extend down just the same as this plank right here was the cross-piece (illustrating), the guide come down to that cross-piece, but there was not any wear. Understand what I mean by the counter-weights running up and down; I could see no wear on them guides only when the counter-weights dropped that time; of course, naturally it come down then and spread out the guides at the bottom.

Q. The track was fixed right down?

A. Yes, come right down, right down just as close as it could.



(Testimony of W. M. McArthur.)

Q. When you repaired it you took a wind off the drum?     A. Yes.

Q. And put it into the eye?

A. Took one wind off the drum above and took and wound it around, I think, if my memory is right, we wound it around the eye towards the counter-weight, just like that (illustrating); went around the eye. We wound it twice, if I remember right, and then we put the clamp on it. [165—105]

Q. And that was the usual and proper way of doing that work, was it?     A. Yes, sir.

Redirect Examination.

(By Mr. TEATS.)

Q. Before that break, do I understand you could see the counter-weights come down below the floor before it broke?

A. They come down even, best of my knowledge, about even with the floor.

Q. And then when you were underneath,—

A. Yes, sir.

Q. Underneath you could not see the counter-weights?

A. No, you could not see them. By looking sideways at them this way (illustrating) you could see them. If you looked this way you could see them.

Q. Same as looking up a chimney?     A. Yes.

(By Mr. EVANS.)

Q. You could look up there?

A. You could look up there; you could look up this way and see the counter-weights (illustrating).

Q. The guides were open?

(Testimony of W. M. McArthur.)

A. Yes, they had to be.

Q. You didn't have to get down this way and look up (illustrating)?

A. You had to get down this way to look up (illustrating).

Q. Clear down to the bottom?

A. You had to get down to the mud and scrooch up and look under the joist. [166—106]

Q. Clear down to the mud?

A. Yes. You had to stand on the mud.

Q. Get your ear on the mud?

A. No; you would not have to get your ear on the mud, but you would have to stand humped over this way in order to look under there.

(Witness excused.) [167—107]

**[Testimony of H. E. Hanson, for Plaintiff.]**

H. E. HANSON, a witness called for and on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. What is your name? A. H. E. Hanson.

Q. Where do you live?

A. 112 South 36th street.

Q. How long have you lived in this city?

A. Thirty-one years.

Q. What is your business? A. Carpenter.

Q. Have you ever worked for the Carstens Packing Company?

A. Different times; three or four different times.

Q. When did you work for them—what date?

(Testimony of H. E. Hanson.)

A. The last time was in April and May last year; a year ago last April.

Q. What did you work at then?

A. The new building, new construction.

Q. What was that building?

A. An addition. The first work I done was between the two, the glue-house and another house, roofed over between the two, that was in April, and last year I put an addition to the glue-house.

Q. That is the addition that you see here on this map A, called "addition to the glue-house"?

A. Yes, that is the addition.

Q. Do you remember about when you commenced on that addition?

A. I cannot say exactly the date. I say I started the first [168—108] of April and I completed a roof on there, and that was the latter part of April or first of May, I could not say the date exactly because I started the first of April to do the work, somewheres the first days in April I started to work.

Q. But you cannot tell when you first started on the new building? A. No, I cannot say the date.

Q. Who were you working under?

A. I was working under Cornils, and Charlie Lundgren was the real boss, the real one.

Q. Do you remember an accident to Louis Godo?

A. I do.

Q. How near completed was the new addition at that time? A. It was up.

Q. Up, was it? A. Yes.

Q. How near completed?

(Testimony of H. E. Hanson.)

A. I worked on the door in front, fixing the sliding door in the front.

Q. Which is the sliding door?

A. Right in the middle, that sliding door in the west end in the middle. There is a sliding door on the west end of the building.

Q. And about the center of the addition?

A. About the center of the building, yes. I fixed the sliding door, putting pipes, and fixing the sliding door at that time.

Q. Did you see Godo and Pete Cornils just before this accident? [169—109]

A. Yes.

Q. Where?

A. Mr. Cornils at a bench, and Godo was over there. They worked over there and had a bench. I do not know what he done because that was not my business to attend to what he did, and I had nothing to do with them, but they were working on that bench there. I was putting a pipe in. I was down to put my brace and screw-driver away. I was just by the corner and at my box. Cornils came along and said to Louis, "I want you to go with me and take measurements," and he walked out. That was all it was.

Q. Whereabouts were you when that conversation occurred?

A. I was right by the corner, right by the tool-box by the corner, right by the northwest corner. The tool-box was right there.

Q. How far away from you were Godo and Pete?

(Testimony of H. E. Hanson.)

A. I could not say exactly the feet.

Q. About how far?

A. It would be about eight or ten feet; something like that.

Q. To the north of the building?      A. Yes.

Q. Then when did you hear of the accident?

A. I was up,—I had a scaffold putting the pipes up, and I had my brace and bit and I went up on the scaffold,—

Mr. EVANS.—I object to that as immaterial when he heard of the accident.

The COURT.—Objection overruled. You were asked when you heard of the accident and that is all of the question, and you started out on something else. Do you know when you heard of the accident? Just answer the question. [170—110]

The WITNESS.—About half an hour or something like that. I could not say exactly the time or minute, because I did not look at the time. I was working and so I did not look at the time. Some little time.

Q. What did you do as to Godo?

A. I took my brace and bit and went up on the scaffold above,—

Q. When Godo got hurt what did you do?

A. I was working there putting that door—working at that door.

Q. What did you do then?

A. Oh, hanging the door, putting the pipes and hanging that sliding door.

Q. And what did you do?      A. What did I do?



(Testimony of H. E. Hanson.)

Q. Yes.      A. The sliding door—

Q. I mean as to Godo; did you help get him out?

A. I jumped underneath and dragged him out.

Q. Where did you get Godo?

A. I was halfway under the building when the fellow come dragging the gentleman out, and I helped drag him out.

Q. What condition was Godo in at the time when you first saw him underneath?

A. I thought he was close to death; that was the way I looked at it.

Q. And what did you do with him?

A. We dragged him out and put him on some boards or planks that was there.

Q. And what condition was he in when you got him over to the plank? [171—111]

A. Well, pretty bad. I could not say. He looked pretty bad to me, and bleeding, and I could not say how bad he was, but he looked pretty bad to me.

Q. Did he talk to you?      A. No.

Q. How long did you stay there with Godo?

A. I just stayed there a little while and I went up and took his overalls off, and went up and hung up his overalls and took his tools out and hung them up where he had his tool-box.

Q. Did you see Pete Cornils there?

A. I saw him; yes.

Q. When did Pete come up there first?

A. A little after, I could not say how long, how many minutes, but a little after he come up.

Q. Did Godo have anything to say at that time?

(Testimony of H. E. Hanson.)

A. No, I did not hear him say anything. I heard Godo say nothing there at all.

Q. Now, when you commenced building the new addition, what did you do with the platforms that run along the side of the old place?

A. Tore that out.

Q. And what did it leave?

Mr. EVANS.—We object to all of that as immaterial. The details of that work he did there would have nothing to do with this case; it is encumbering the record.

The COURT.—The objection is sustained. It is too general. It does not show whether it is applicable or not.

Mr. TEATS.—It is a preliminary question.

Q. Now, when you tore away the platform could you see the [172—112] condition of the ground beneath the platform, the old platform?

A. Pieces between—

Q. How?

A. Partly between. The wood was loose, very loose. If I wanted to look through I could look through underneath, but it was boarded up, it was all boards.

Q. What do you mean by that? I do not understand what you are driving at.

A. It was not tight boards, it was old boards, being cracked so I could look through.

Q. But where was that?

A. Before the platform was moved.

Q. When you took the platform away could you

(Testimony of H. E. Hanson.)

see down on the tide-flats? A. Oh, yes.

Q. What is the condition there?

A. Well, the condition that is that way underneath there. I would not advise anybody to go under there, and I did not like to go there myself.

Mr. EVANS.—I move to strike the answer as not responsive.

The COURT.—Motion granted and the jury instructed to disregard it.

(Question repeated.)

A. It is mud, and well, I could not mention all the things. If a man stepped in there he would go to here (indicating hips), right in the mud of all kinds. There is dirt of all dimensions and where they come from I could not say.

Q. Filth?

A. Filth of all kinds. It is all kinds of things. I stepped [173—113] into here myself (indicating), and I know there is.

Q. When you built the floor to the new addition how high up on the old glue-house did that go as compared with the platform?

Mr. EVANS.—We object to that as immaterial.

The COURT.—Objection sustained.

Mr. TEATS.—Save an exception.

The COURT.—Exception allowed.

Q. I will ask you whether or not the floor of the new addition was higher or lower than the floor of the platform.

Mr. EVANS.—I object to that as immaterial.

The COURT.—The platform—is that the wharf?

(Testimony of H. E. Hanson.)

Mr. TEATS.—No. The platform that was built on the west end of the glue-house with the runway down below here, and it was about three feet above the wharf.

The COURT.—Objection sustained.

Cross-examination.

(By Mr. EVANS.)

Q. Now, how long were you engaged in the construction of that new part, how many weeks, until you got down to where the sliding door was?

A. Well, now, I could not say how many days I was working there. I could not say that.

Q. Was it one week or two weeks or three weeks or five weeks?

A. I could not say how many days I was working. Sometimes I go there and I worked there the biggest part of the day, and then go away maybe to go to do some other work over here, and I could not tell you how many days.

Q. When did you start to work on the new building? [174—114]

A. Well, I started at the work in April.

Q. In April? A. First of April.

Q. When in April?

A. In April, before we started on the other part.

Q. When did you start on the new addition?

A. I could not fix the date of that addition.

Q. How long were you working on the other part you say you were working on?

A. I could not say that either.

Q. Two or three weeks or two or three days?

(Testimony of H. E. Hanson.)

A. I do not have the time.

Q. Have you any idea?      A. I could not tell you.

Q. Do you keep your own time?

A. I kept my time to see how much money I got, that is all I had, but I did not keep track of work, how many days I worked on either place.

Q. Who is the timekeeper?

A. Well, we ring up the time-cards there and I do not know who is in there as timekeeper.

Q. You kept your own time, did you?

A. I kept my own time, always.

Q. Have you got your time-book?      A. No.

Q. What did you do with it?

A. I have it at home.

Q. You have it at home?      A. Yes.

Q. Did you ever look at that and see how long you worked [175—115] there?

A. If I had the time-book—

Q. Did you ever look at the time-book before you testified in this case to find out how long you worked there?

A. Everywhere I worked I have a time-book to see how much money is coming to me. That is all I care for. I did not count the work, what work I did. I just counted the days.

Q. Then the only thing you can really remember distinctly about the time there is that you commenced to work on the old part about the first of April?

A. I do not remember that exactly. I could not answer.



(Testimony of H. E. Hanson.)

Q. You say that you commenced to work on the old part there about the 1st of April?

A. Sometime the first days of April; yes.

Q. And that is about as definite as you can get to it?

A. That is as near as I can get to it. It was a little after election.

Q. The time you started working on the old part and the new addition is simply your recollection now?

A. Well, I worked right along, but I do not know the date when they changed me over. I could not say the date when they changed me from one place to the other. I could not say the date.

Q. You have not any memoranda or any idea as to how long you worked there on the new addition?

A. No; I could not say exactly how many days I worked, but I did know.

(By Mr. TEATS.)

Q. Who was working with you, or did you say?  
[176—116] A. D. West is his name.

Q. Vest? A. Yes.

Mr. FLETCHER.—How do you spell it—Vest or West?

A. I could not say how he spelt his name, either.

Mr. TEATS.—Did you have any carpenter helpers on that building? A. Yes, I had one.

Q. What was his name?

A. I do not know his name either.

(Witness excused.) [177—117]

**[Testimony of Bennie Carroll, for Plaintiff.]**

BENNIE CARROLL, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. What is your name?      A. Bennie Carroll.

Q. Where do you live?      A. St. Paul Avenue.

Q. How long have you lived in this county?

A. Two years last September.

Q. Where were you working on the 27th day of May last?      A. Carstens Packing Company.

Q. What were you working at?

A. I was carpenter's helper.

Q. When did you commence working there?

A. Well, sir, I should judge last April or sometime along about the 1st of May.

Q. What did you commence working at when you first went over there?

A. Well, I was on that new shed or new building, or whatever you call it between the two houses, between the schoolhouse and the cannery.

Q. The new addition as we find it here (Exhibit A)?      A. Yes, sir.

Q. About when did you commence working there?

A. Well, sir, as near as I can remember, about the last of April or 1st of May; along in there sometime.

Q. When you first commenced working there was there any work done on the new building?

A. Well, they were just starting.      **[178—118]**

Q. Just starting?      A. Yes.

(Testimony of Bennie Carroll.)

Q. How long had they been working, do you know?

A. Well, now, I could not say. I went over there and struck them for a job and he put me to work.

Q. And where were you when Godo got hurt?

A. Well, I was helping the carpenters when I heard Mr. Olson holler. I run underneath the building.

Q. Where did you go under?

A. Well, sir, it is right, I should judge, about anywhere from three to six feet from the corner of the building.

Q. Which way—south of the northwest corner?

A. Yes, right in above there where you have the mark.

Q. Right in here (referring to Exhibit "A")?

A. Yes, sir.

Q. Which way did you go?

A. Kind of made a circle around like that (indicating).

Q. And where did you go to?

A. I went underneath, as far as there was a porch underneath. I helped drag him out from there.

Q. What do you mean by porch?

A. Platform, before this new building was put on.

Q. Over to here (indicating on Exhibit "A")?

A. Yes, sir.

Q. And when did you first see Godo?

A. Why, he was working around there as a carpenter.

Q. When you went in under?

(Testimony of Bennie Carroll.)

A. It was up underneath there by the porch.

Q. That is the platform?

A. Yes, the platform. [179—119]

Q. Where that old platform was? A. Yes, sir.

Q. Was there any platform there then?

A. Yes, sir.

Q. And you helped take him out? A. Yes, sir.

Q. What condition was he in when you first saw him?

A. Well, sir, I thought the man was dead.

Q. What did you have to do to take him out of there?

A. Just naturally helped to drag him; it was as near as you could get to him.

Q. What did you do then when you got him out of there?

A. We took him out. There was some lumber piled up there, boards or something, and the superintendent came to him.

Q. That is Peter Cornils?

A. No, sir, Superintendent Bill—

Q. McHuen? A. Yes, sir.

Q. He was there first, was he?

A. I could not say as to that.

Q. Who helped you get him out?

A. Mr. Olson.

Q. Who else?

A. If I am not mistaken, Hansen.

Q. The witness that just testified?

A. Yes, sir.

Q. And what condition was he in when you got

(Testimony of Bennie Carroll.)

him out at the planks?

A. He was very bad. I thought the man really was dead or crushed or something. He was fainted, like. [180—120]

Q. How long did you stay there?

A. Well, I was told—the superintendent asked me if I had anything else to do in a few minutes.

Q. Were you there when the hack came?

A. Yes, sir.

Q. Did you help put him in the hack?

A. No, sir; I did not.

Q. Who put him in there?

A. Mr. Cornils and Mr. Charles—the foreman there.

Q. Lundgren? A. Lundgren.

Q. What, if anything, did they do about—did they try to have him sign a paper while you were there?

Mr. EVANS.—We object to that, if your Honor please.

The COURT.—Objection sustained.

Mr. TEATS.—I wanted to show his condition, that was all.

Mr. EVANS.—It is not the way to show his condition.

Mr. TEATS.—Yes, sir, it is a good way to show it.

Mr. EVANS.—No cross-examination of this witness.

Thereupon the jury was admonished and excused until half-past one o'clock, at which time, the call being waived and the jury being present, the trial of this cause is continued as follows: [181—121]



(Testimony of Bennie Carroll.)

Mr. BENNIE CARROLL, being recalled, continues his testimony as follows:

Direct Examination (Continued).

(By Mr. TEATS.)

Q. Do you remember what day you went *wor* work?

A. Not exactly, no, sir. That was along about the last of April or first of May; right in there, close.

Q. And what did you first work at?

A. I first worked at—well, it was on that roof business where they were putting up posts for the roof. If you let me point it out to you there?

Q. Yes, come here and show it to me.

A. There was one building over here, another building over here. Across it was a roof. It was the roof of another building, from one building to another.

Mr. EVANS.—Q. Built over afterwards there?

A. Well, it was—I should judge it was probably sixty feet wide; something along there.

Mr. TEATS.—Q. It's between the old glue-house and the building on the other side?

A. Yes, sir, on that side.

Q. And part of it shown in Number 2?

A. If I am not mistaken this was a new building; it was from this building to this one. We put on this roof when we started to work.

Q. So that when you stated you were on the new addition you meant over here?

A. I meant on this building over here.

Q. The roof over the shed?

(Testimony of Bennie Carroll.)

A. Yes. [182—122]

Q. Where they have the wool-pulling machine?

A. Yes, sir. There is no end to this, either end.

Q. It is not enclosed; in other words, only on two sides? A. No, sir.

Q. And that is by the building? A. Yes, sir.

Q. Then after working there on that new roof, where did you go to work?

A. On this building right in front where that shows there.

Mr. EVANS.—I object to this; he went all over this this morning.

Mr. TEATS.—No, he was mistaken when he said the “new building.”

A. Well, they called that the new building when I started.

Q. Do you remember about how long you were working on this new shed?

A. No, sir, I do not. It was several days, I know that.

Q. Now, during the time you were working on this new shed or shed across between the two big buildings, was the elevator out of repair? A. Yes, sir.

Mr. EVANS.—I object to that as immaterial and move to strike it out. There is no complaint about the elevator being out of repair.

The COURT.—Objection sustained, and the jury instructed to disregard the answer.

Mr. TEATS.—Save an exception.

The COURT.—Exception allowed.

(Testimony of Bennie Carroll.)

Cross-examination.

(By Mr. EVANS.)

Q. Mr. Carroll, you went over there and saw that they were [183—123] doing some carpenter work, and struck them for a job; is that the idea?

A. I struck them for a job; yes, sir.

Q. The other men were working on that when you got there? A. They started to work; yes, sir.

(Witness excused.)

At this time the deposition of S. P. Beyer, a witness on the part of the plaintiff, taken on the 10th day of October, 1912, before Leo Teats on a stipulation, was offered by the plaintiff and admitted by the Court and read to the jury.

Mr. TEATS.—I would like to introduce in evidence Identification “A.”

The COURT.—It will be admitted.

Thereupon said Identification “A” is received in evidence by the Court and marked as Plaintiff’s Exhibit “A,” being a plat.

Mr. TEATS.—We have Dr. Quevli and Dr. Ritz, who were subpoenaed; they said they would be here this morning, and each said they were tied up in operations in the hospital and would be here at half-past one. Those are the only two witnesses we have. [184—124]

The COURT.—Have you any objection to proceeding and hearing the doctors later?

(There being no objection, plaintiff rests his case, with the understanding that the doctors might be put on the stand later.)

Mr. EVANS.—I desire to interpose a motion at this time, and ask to have the jury excused, and we can argue that motion, and the doctors can testify later, and that will not change the grounds of our motion.

The COURT.—The testimony of the doctors will simply go to the condition of the plaintiff?

Mr. TEATS.—Yes.

The COURT.—The jury will be excused, and remain within call. [185—125]

**Motion [for a Nonsuit, etc.].**

Mr. EVANS.—At this time the defendant moves the Court to grant a nonsuit in this cause and take the case from the jury on the following grounds:

First, that the plaintiff has failed to prove a cause of action as laid in his complaint.

Second, that there is an absolute failure of proof of any negligence on the part of the defendant.

Third, that the accident was due to contributory negligence and want of due care and caution on the part of the plaintiff, and

Fourth, that the condition was open and apparent and the plaintiff assumed whatever risk there was.

(Discussion.)

The COURT.—So far as the conditions of an instrumentality like an elevator are concerned, and the operation of the elevator and how low down the elevator counter-weight came, that is such a permanent structure that the defendant must be held as a matter of law to know its condition through use or how low down the elevator weight would come, and if it

constituted a danger, the master would be held to know that, or if it was a latent danger or whether it was an apparent, open, obvious danger. The plaintiff has testified that he was forbidden to tear up the wharf and go down through the floor of the wharf to make this measurement, and so far as the evidence shows if he did not tear up the wharf to go down there there was not any other way than the one he took, than to go outside the building and go through the hole he [186—126] tells of. Now, after being forbidden to tear up the wharf this was the way he would ordinarily go or ordinarily have to go, the master, as the Court views it, might be reasonably held to anticipate that fact, and if he, anticipating the fact he would have to go under the building—the condition under the building is not exactly clear to the Court from this evidence. It is not exactly clear to the Court how much of the time Mr. Godo worked around this elevator shaft on the main floor of the building, nor exactly how apparent it was that this counterweight, if it can be seen at all, would go below the floor of the building after this repair. What view anybody would have of it.

Mr. EVANS.—Underneath?

The COURT.—When he is on the main floor before he goes underneath. In reference to your cases about a man going in a place of danger, I understand those cases are about a man voluntarily going to a place of danger that he knows is dangerous. It is a question of fact whether the plaintiff knew that this elevator weight went below the floor. He seems to maintain that it had only been changed about a



month. There is no positive evidence that he knew it was going lower. There is not any evidence that he knew that it was only a few inches of this cable broken off. There is testimony here from somebody or your question indicated—I do not remember the exact answer of the witness—it was practically a few inches above the eye of the weight. If it had been broken off a sufficient distance above the weight to just take up a length of the cable around the drum or whatever it was rolled around, it would not have gone down below the floor. In this mine case the plaintiff [187—127] testified that he knew that was a shaft and that those cages were going up and down there and it was dangerous, and all the plaintiff's testimony and all the testimony in the case so far might justify the jury in concluding that he still believed, still had a right to believe that this weight was not going below the floor, and if it did not go below the floor there is no danger in the shaft, and so far as under the building is concerned it is not at all clear how great this other space was. According to these pictures there are two openings, one through the elevator shaft and one at the side of it, and you argue that the plaintiff would be held to take care of himself. He says he was taking care of himself, he was trying to keep out of the filth, and if he had no reason to believe that this weight was coming down there rendering that a dangerous place, and if they had laid boards and things there when they took up that weight so that it was clean and a suitable place to go through, there might be a temptation there to go through that way and to keep out of this dirt.

Of course if he knew the weight was coming down he would assume the risk. The Court cannot say that men, reasonable men, cannot differ regarding how obvious that danger was to him. The testimony is it was dark under there, and the testimony is he had not been down there very often or anybody else very often, and from the fact that the shaft was not built up with boards to keep people from going in there would show that the company itself did not think it was very dangerous, or it would have been their positive duty to board it up so that the people [188—128] would not get into it. The motion will be denied.

Mr. EVANS.—Note an exception.

The COURT.—Exception allowed.

(Whereupon, the jury being recalled, the trial is continued as follows:) [189—129]

Thereupon, to sustain the issues upon its part, the defendant introduced the following testimony:

**[Testimony of Peter D. Cornils, for Defendant.]**

PETER D. CORNILS, who being duly sworn, testified as follows:

Direct Examination.

(By Mr. EVANS.)

Q. You are hard of hearing, aren't you?

A. You will have to talk a little loud. I am hard of hearing.

Q. State your name to the Court.

A. Peter D. Cornils.

Q. Where do you live?

A. 1010 South 19th street.

(Testimony of Peter D. Cornils.)

Q. What is your business?

A. I am master mechanic, Carstens Packing Company.

Q. How long have you held that position?

A. Since 1903.

Q. Do you know the plaintiff, Louis Godo?

A. Yes, sir.

Q. Was he employed there at any time?

A. Yes, sir.

Q. I show you Defendant's Identification 5 and ask you to state what that is.

A. That is a foundation of the part of the glue-house.

Q. Is that a correct representation of the glue-house foundation?

A. It is a correct representation of the glue-house, or part of it.

Q. What is this? [190—130]

A. That is the elevator-pit.

Q. That you will mark elevator.      A. Yes.

Q. What is this space here?

A. That is the space where the counter-weight comes down.

Q. That is marked counter-weight.      A. Yes.

Q. What is this space, which I now mark with an X?      A. That is a vacant space.

Q. What is this space I now mark with XX?

A. That is another vacant space.

Q. How wide are those two spaces on either side of the counter-weight?

A. One of them, I think, are 14 inches and the

(Testimony of Peter D. Cornils.)

other 15 or 16 inches, in that neighborhood.

Q. At the time Godo was hurt were those spaces there?     A. Yes, sir.

Q. How far was it from the mudsill to the joist above?     A. Five feet six inches.

Q. Do you know where the counter-weight formerly ran before the cable broke?     A. Yes.

Q. State whether or not it stopped above or below the floor.

A. Stopped below the floor.

Q. How far below the floor did it go?

A. Between 15 and 18 inches.

Q. Have you seen it—you tell that from observation or how?

A. The proof would show there to-day if a man goes there to the house and looks at it.

Q. Have you seen it before the break in question when the [191—131] counter-weight came down below?     A. Yes, sir.

Q. I call your attention to the ringer. When was that ringer foundation put in?

A. It was put in in the middle of April.

Q. Was that before or after the break in the elevator cable?     A. It was after.

Q. When, if you know, was the break in the cable which held the counter-weight?

A. As near as I can recollect, it was in the middle of January.

Q. Can you state as a positive fact what month the change in the cable, lowering the counter-weight, was made?     A. In January.

(Testimony of Peter D. Cornils.)

Q. In January, 1911?      A. Yes, sir.

Q. Did you hear Mr. Godo testify?

A. I heard some of it; most of it I did not understand.

Q. Did you hear him testify as to some instructions that you gave him?

A. Well, not clearly enough, you know.

Q. I will ask you to state what this indicates here where it is marked "vat."

A. That is the vat he was supposed to counter-sink down into the wharf.

Q. Was that vat to go into the building or outside of the building?

A. The vat was to go outside of the building.

Q. Did you give Mr. Godo any instructions in reference to the placing of that tank and making measurements for it? [192—132]

A. I had the tank there; it was too long. I told Mr. Godo to take up this plank, get a peevy and take up that plank, and find the girder there and take the measurements from that girder, and cut down the tank to fit it.

Q. Did you show him the plank you wanted him to take up?      A. Yes, sir.

Q. Were you standing there close to the plank?

A. Yes, standing very close by when I told him to take up the plank.

Q. Did you at any time tell him not to take up the plank or Tom would give him hell?      A. No, sir.

Q. Did you ever make any similar remark of that kind to him?      A. No, sir.



(Testimony of Peter D. Cornils.)

Q. Did you ever indicate to him he was not to take up the plank?     A. No, sir.

Q. Did you know that he was going under the glue-house to attempt to make the measurements for that tank?     A. No, I did not.

Q. Did you ever direct him to go under the glue-house or wharf?     A. No, sir.

Thereupon the blue-print heretofore referred to as Identification 5 is offered in evidence by Mr. Evans, received in evidence by the Court and marked as Defendant's Exhibit 5.

Q. What does this space here towards the center of the map indicate?

A. The center is the foundation of the top floor line, and [193—133] the dotted line is the measurements of the bottom of the ringer.

Q. Ringer foundation?     A. Yes.

Q. How far is that from the elevator?

A. Between 18 and 20 feet.

Q. Did you ever know of any of the men using the space between the counter-weight guides to discharge water?     A. No, sir.

Q. You testified as to the time the ringer foundation was put in. When was that?

A. It was in April, 1911.

Q. I will call your attention to Defendant's Exhibit 4, and call your attention to those spaces between these timbers, the timber marked 4 and the timber with the 2X on it; is that a correct photograph of the situation at the time Godo was hurt?

A. Yes, sir.

(Testimony of Peter D. Cornils.)

Q. Was there any boards on there? A. No sir.

Q. What space is there between this timber marked X and the timber marked XX?

A. Three feet and two inches.

Q. What have you to say as to the conditions under the packing-house, whether there were any obstructions aside from the elevator and counter-weights, ringer tank and ringer foundation? A. What?

Q. Were there any obstructions, was it open or not? A. It was all open. [194—134]

Q. Was there anything to hinder Godo if he desired to go under there from going through this space marked 4 and around in safety?

A. Not a bit of it.

Q. Was that open and apparent so that he could see it?

A. Yes, sir. He run right straight in against it.

Q. Were you there when the glue-house was built?

A. Yes, sir.

Q. State whether or not there was any space between the foundation and the mudsill and mud.

A. No, sir. At the time we were building it there was a space, but it had been filled up and the sills were in the mud at the present time.

Q. So that there was a solid foundation from the glue-house down to the mud? A. Yes, sir.

Q. I will show you Defendant's Identification 6 and ask you what that picture shows at the place the picture of the man appears.

A. It shows over there the lay of the sill, which is supporting the joist of the walls.

(Testimony of Peter D. Cornils.)

Q. Is this the foundation of the glue-house?

A. This is the foundation of the glue-house.

Q. Is that location where your picture appears there opposite where the tank is sunk in on the outside?

A. Yes, the tank is right there on the outside.

Thereupon said Identification 6 is offered in evidence by the defendant, received in evidence by the Court and marked as Defendant's Exhibit 6.  
[195—135]

Q. I show you Defendant's Identification No. 7 and ask you what that is.

A. That is a front view of the glue-house, of the new addition.

Q. The new addition?      A. Yes, sir.

Q. When was that constructed, the new addition?

A. It was constructed the latter part of April.

Q. In April?      A. Yes, sir.

Q. 1911?      A. Latter part of April.

Thereupon said identification is offered in evidence by the defendant, received in evidence by the Court and marked as Defendant's Exhibit Number 7.

Q. I show you Defendant's Identification No. 8 and call your attention to the trough. State what that was.

A. It was an old feed trough that they took in there at the time before they put down the foundation for the ringer, to put the water in, leading the water away from the foundation so that they could finish the foundation.

Q. Were you familiar with the location of that

(Testimony of Peter D. Cornils.)

trough when it was put in there?     A. What?

Q. Were you familiar with the location of it under there?

A. Well, I did not pay close enough attention, only I know in what condition the ringer was standing at the time of the accident.

Q. The ringer?

A. I mean the trough, at the accident.     [196—136]

Q. At the time of the accident?     A. Yes.

Q. I will ask you whether or not that trough was placed there between the uprights that the counter-weights ran in.     A. It could not.

The COURT.—Which accident, at the time the cable broke or at the time the man got hurt?

Mr. EVANS.—I am simply asking at the time the man got hurt.

Q. At any time or at the time Godo got hurt was this counter-weight or this trough there between the uprights where the counter-weights ran?

A. No, sir.

Q. At the time the ringer foundation was constructed did it run through there?

A. I haven't noticed it.

Q. Were you under there?

A. I have been in there from the time—no, not directly under through there—I generally look down from the top after I cut the hole out in the floor.

Q. If the trough was put through there on top of the mudsill between the guides or upright pieces that the counter-weights worked on, would the counter-weight if it had been changed have come down and

(Testimony of Peter D. Cornils.)

crushed that?      A. Yes.

Q. Had the counter-weight been changed at the time the ringer foundation was put in?

A. No, sir; not to my knowledge.

Q. I say had the counter-weight been broken and been repaired at the time the ringer foundation was put in?      A. No, sir. [197—137]

Q. It had not?

A. It had been repaired before in January.

Q. That is what I asked you?

A. I misunderstood you.

Q. The counter-weight cable broke in January?

A. Yes.

Q. And the ringer foundation was put in when?

A. In April.

Mr. EVANS.—We offer this in evidence, Identification 8.

Mr. TEATS.—I wish to cross-examine him.

The COURT.—Proceed.

(By Mr. TEATS.)

Q. You don't know where that box was when they were shipping the mud and stuff out of this hole for the ringer foundation?

A. I know where the box was; yes.

Q. You did not see where it was while they were dipping out the water?

A. I know where the box was, but I did not see where that end led to.

Q. You did not know where the end led to?

A. No, sir.

Q. So that you don't know whether this shows



(Testimony of Peter D. Cornils.)

where the box went to or not?

A. It shows exactly the box situated in the position the way I seen it, but I did not see that end because I looked from the top down.

Q. You did not see it while they were at work?

A. Yes.

Q. Would you say it was in that position? [198—138]

A. The laborers on the glue-house poured the water out of that hole there in order to prepare for the foundation.

Q. That was the position it was in?

A. That was the position it was in at the time they were using it.

Q. Never been changed?

A. Not to my knowledge.

Q. It might have been in a different position over this way at that time?

A. Might have been over there. I could not swear to it.

Q. So that that might have stuck over this way?

A. It could not be stuck in between the guides.

Q. It might have been stuck over this way?

A. There is no room for it there; it could not pass through any other way there. That trough is 14 inches wide and that would not have room to go out there.

Q. That trough might have stuck along here?

A. No, sir; it was not on this side of these posts there; it was over on the other side of that row of posts.

(Testimony of Peter D. Cornils.)

Q. What posts are these?

A. These are three posts that support the girder of the main post leading up to the second floor.

Q. What is this place over here?

A. That is the elevator-shaft.

Mr. TEATS.—We haven't any objection to this.

Thereupon said Identification 8 is received in evidence by the Court and marked as Defendant's Exhibit 8.

(By Mr. TEATS.)

Q. To make it a little plainer to the jury, this space right [199—139] here is the elevator-shaft?

A. Part of the elevator-shaft.

Q. We will call it "el"? A. All right.

Q. And these posts?

A. That is a post and there is a post and there is a post (indicating). Here is one going straight up; you can see the grain of the wood going up.

Q. Ps for posts? (Marking on exhibit.)

A. Yes, sir.

(By Mr. EVANS.)

Q. Mr. Cornils, since the repairing of the cable in January, 1911, down to the time of the accident, to Godo, had there been any change in the cable?

A. No, sir.

Q. Did you see Godo immediately after he was injured? A. Yes, sir.

Q. Did you have any conversation with him?

A. I did not hear—

Q. Did you have any talk with him?

A. Yes, sir.

(Testimony of Peter D. Cornils.)

Q. What was said?

A. Well, nothing that amounted to—

Mr. TEATS.—Whereabouts?

A. With Godo immediately after he was injured.

Mr. TEATS.—I object to that. The evidence shows so far Godo was not in a condition to be talked to and could not understand what was said, and a conversation with a dead man is immaterial.

The COURT.—That is one of the questions in the case, and goes [200—140] to the weight of the evidence and not to its admissibility. Objection overruled.

Mr. TEATS.—Save an exception.

The COURT.—Exception allowed.

Q. What was said between you and Godo, if anything?

A. Well, I stepped up there; my first impression was, I said, “For God’s sake! What did you go under there for? Why didn’t you take up the plank as I told you?”

Mr. TEATS.—We object to that, that is not any expression, it is not an expression of Godo’s it is not an admission, it is only his own self-serving proposition and we object to it and move to strike it from the record.

The COURT.—Objection overruled. Motion denied.

Mr. TEATS.—Save an exception.

The COURT.—Exception allowed.

Q. What did Godo say?

A. He said, as much as I understood it, I do not

(Testimony of Peter D. Cornils.)

know why I did it.

Q. He said something to you?

A. That is the expression I understood from him, I do not know why I did.

Q. I think I asked you, you superintended the building of the glue-house originally? You were there and superintended the original construction of the glue-house? A. Yes, sir.

Q. You knew the foundation went clear down to the mud? A. Yes, sir.

A JUROR.—I would like to know the size of this drum this coil was taken off of.

Mr. EVANS.—Q. What was the size of the drum up above that the [201—141] coil was taken off of? A. Thirty inches in diameter.

Q. How much was the counter-weight let down from where it had been?

A. The counter-weight was let down I should judge from 33 to 34 inches.

Q. What was the diameter of the drum?

A. I should judge about thirty inches.

Q. What was the condition under the glue-house?

A. All mud.

Q. All muddy? A. Yes.

Q. Was there any difference from one spot to another, appreciable?

A. Some place maybe was a little less, and other places go up to the hip in it.

Q. How long was the wind you took off?

A. I should judge you take three times three, 14, 9. 42. That is about the size of it.

(Testimony of Peter D. Cornils.)

Q. How much?

A. 9.14 feet. No, 30 inches, it would be 94 inches and two-tenths.

Q. That you actually took off?

A. 94.2 would be about it, if you figure it.

Q. The weight was actually let down about how far? A. About 33 to 34 inches.

Q. That is the actual measurement there?

A. That is the actual measurement of what the counter-weight was, lower than it was put before.  
[202—142]

Cross-examination.

(By Mr. TEATS.)

Q. You are a brother in law of Carstens?

A. So I am, yes.

Q. You have been master mechanic there for the last eleven years? A. Nine years, I figure.

Q. Since 1903? A. 1903.

Q. You have charge of the men in the mechanical part of it? A. Yes, sir.

Q. And if there is a dangerous way, any danger of any machinery, it is your duty to see that it is made safe? A. That is for me to look after, yes.

Q. If there is any danger after you have repaired a machine making it more dangerous than before, it is your duty to see that it is remedied?

A. Yes, sir.

Q. So that in this case if Godo went under there at your direction, it was your duty to notify him of the change in the cable wasn't it?

Mr. EVANS.—We object to that.



(Testimony of Peter D. Cornils.)

A. He did not get any orders from me.

Mr. EVANS.—We object to that as not proper cross-examination, argumentative, immaterial and calling for a conclusion of law.

The COURT.—Objection sustained.

Q. How many times during the last several years have you been under this glue-house?

A. I could not tell you the times. [203—143]

Q. As a general thing you don't go under there?

A. Yes, sir, anywhere where the men go I go.

Q. But as a rule you send the men under there?

A. No, sir, I am always going under myself first.

Q. First? A. Yes, sir.

Q. You did not go under there first when they fixed the foundation did you? A. Yes, sir.

Q. Were you under there during that time?

A. I was right under there, yes, sir.

Q. I thought you said you looked down through the hole?

A. I took *an* investigated the ground and then I gave the order to cut out the hole through the floor first for them to get light in order to see what they were doing down in the dark hole.

Q. You say that you went in there first?

A. Yes, sir.

Q. Which way did you go in?

A. I came in, I did go in through the small hole in the middle span of the building, on the west side of the building.

Q. In the small hole? A. Yes, sir.

Q. Under the platform?

(Testimony of Peter D. Cornils.)

A. Under the platform.

Q. And was there any other way of going in there at that time?     A. Not at that time.

Q. Now at that time there was just a platform when they were [204—144] putting in this concrete form?

A. Only the porch platform there, yes, sir.

Q. Now you say that that was maybe put in there about the middle of April?     A. Yes, sir.

Q. About the middle of April, that would be about the 15th, somewhere along there?

A. Somewheres in the neighborhood, yes, sir.

Q. And from that to the 20th, somewhere along there.

A. I doubt if it was that long, I think it was put in in the neighborhood of the 15th or 16th, more so than about the 20th.

Q. More likely the 15th or 16th than it was the 20th?     A. Yes, sir.

Q. You at that time had not commenced building the new addition to the glue-house?     A. No, sir.

Q. Now, at that time you were building the big shed over the wool-pulling machines and trough, weren't you?

A. That shed was put up already, it was up already before that.

Q. Now, did you employ Mr. Carroll, one of the men who testified here?

A. Yes, sir, he was one of the laborers.

Q. One of the laborers?     A. Yes, sir.

(Testimony of Peter D. Cornils.)

Q. And he went to work there about the 12th of April, didn't he?

A. I would not tell you what date, I do not know sure, but it did not go back that far. [205—145]

Q. But he went to work on the big shed?

A. We built the shed first before we went on that foundation.

Q. He first went to work on the big shed?

A. I could not tell you whether he went on the shed or any other place else. I had a good deal of other work to look after.

Q. You had all the other matters and did not see where he went to work. Do you know when you finished the shed?

A. I could not tell you exactly that time neither.

Q. About when?

A. I know that shed was built at the time when I was giving instructions to cut down the tank, because I was standing by one of the planks supporting that shed and took up that plank.

Q. That is the 27th of May?

A. The 27th of May. I do not know exactly. At the time when that shed was being put up.

Q. You could not swear to that? A. No, sir.

Q. You do not know whether that shed was put up before or after the foundation for the ringer was put in?

A. I could not swear to it exactly, no, sir. It might have been before that, I could not swear to it.

Q. Now, do you say that addition to the glue-house was made in April?

(Testimony of Peter D. Cornils.)

A. In the latter part of April it was started.

Q. Started in the latter part of April?      A. Yes.

Q. And was it completed, when was it completed?

A. Oh, that was quite a little time. We did not have the men [206—146] at it steady all the time. They were off and on at it. Always take men off and on at different kinds of work.

Q. Different kind of work?      A. Yes.

Q. And you do not know when that was completed?

A. No, sir, I could not tell.

Q. Was it completed when Godo got hurt?

A. No, I do not think it was.

Q. Mr. Cornils, when did you see those guides where you say that it shows that the weights came down below the floor?

A. When did I see those guides?

Q. Yes.

A. I seen the guides there from the time they were constructed and put in there.

Q. When did you last see them?

A. I seen them when that building was started in 1906 when the people from Seattle put them in there.

Q. You have seen them guides off and on all the time up to when?

A. I have seen the guides there all the time whenever I have been under that building.

Q. Whenever you were under that building?

A. Yes, sir.

Q. Now, were you ever under that building to the west of the elevator well?

A. I have been under there and all the places.

(Testimony of Peter D. Cornils.)

Q. Have you been in under there?     A. Yes, sir.

Q. What for?

Mr. EVANS.—We object to that. [207—147]

A. I have been there to the shaft; sometimes I have been over there to the glue-house floor.

Q. When were you out there to the west of the elevator well?     A. To the west of the elevator well?

Q. Yes.

A. Just went just underneath the porch, that is all.

Q. Just underneath the platform?     A. Yes, sir.

Q. Now, when were you under there?

A. I could not tell.

Q. Never was under there, were you?

A. I have been there many times, I haven't any idea.

Q. Many a time?     A. Might be many a time.

Q. When?

A. I could not tell you because there are too many times for me to go under there.

Q. What way would you get in there?

A. It all depends. Sometimes there was timber right in there which was smashed up, and I seen that the guidepost was hanging under it and did not have any support, and that was the last time I went in there and investigated this guide-post and steadied them up.

Q. When was that?

A. That was after the cable was broke.

Q. After the cable was broke?     A. Yes.

Q. And after that time you never were down there?     A. Oh, I might have been down there.



(Testimony of Peter D. Cornils.)

Q. But you never were in there at that place at that time? [208—148]

A. Not any particular reason for it, I don't think.

Q. Now, you are quite sure the guide showed it was worn? A. What?

Q. You are sure the guide showed it was worn down below the floor?

A. No, sir; it did not show anywhere down below.

Q. It don't show anywhere down below the floor?

A. No, sir.

Q. I thought you said the guide showed a wear below the floor?

A. No, sir; I was up on the top floor where you can see the whitewash mark on the guides. The cable never been any higher than that. And you take from that mark down to the present position of the elevator and you can see between 30 and 34 inches.

Q. So that I was mistaken when I understood you to say that the guide down below the floor showed it had been worn down below?

A. No, sir, that was not my expression.

Q. Then you never saw the weight come down below the floor as a matter of fact?

A. Yes, sir; I seen the weight below the floor from 16 to 18 inches.

Q. When?

A. Whenever I been there and the weight was there.

Q. There is nothing there on the guide to show it wore there.

(Testimony of Peter D. Cornils.)

A. Did not need to be. I have seen the guide below the floor.

Q. Then the other men who stated it did not go down below [209—149] the floor are mistaken?

A. They are mistaken, I should say so.

Q. You say the cable broke in January?

A. January 16th or 17th, and it was repaired.

Q. Between the 16th and the 17th? A. Yes, sir.

Q. What makes you think it was between the 16th and 17th?

A. Because I have been investigating the time-book.

Q. Now, you don't know from your own memory?

A. Because I have got too much other things to think of, and I was only going by the time-book.

Q. From your memory you do not know but what it might have been broke some other time?

A. It could not have been.

Q. I say from your own memory?

A. All I can tell you is from the time-book I got it from.

Q. You are not testifying from what you absolutely know yourself, only from the time-book?

A. From the time-book, that is all.

Q. You did not make the time-book yourself?

A. No, I did not make the time-book myself.

Q. It is not your business? A. No, sir.

Q. So that you do not know from your own memory when that cable was broken, from your own memory? A. I only can go by the time-book.

Q. Now, after the shed had been completed across

(Testimony of Peter D. Cornils.)

this big space between the two buildings you wanted to put in a large tank?     A. Yes, sir. [210—150]

Q. That is for the purpose of building a plant there for the washing and drawing of the wool, isn't it?     A. Yes, sir.

Q. You were on this job when Godo got hurt. The shed had been completed?

A. The shed had been, yes.

Q. And you wanted to make the measurements for that particular vat?     A. Yes, sir.

Q. You say you told him to go and get a peevy?

A. Yes, sir.

Q. When did you tell him to get a peevy?

A. I told him that the very first time when I gave him instructions to get the measurements, when he got down to the plank what he should measure. I told him to get the peevy.

Q. Whereabouts were you at that time?

A. I was standing by the post at that time where I was supposed to take up the plank.

Q. Were you supposed to take up the plank?

A. Yes, sir.

Q. Isn't it a matter of fact that when you asked him—you says, "You have got to make this measurement," better go below?     A. No, sir.

Q. And he said, "Let's take up the plank"?

A. No, sir.

Q. And you says, "No, if Tom caught you at that he will give you hell, we will have the laborers do that"?

A. No, sir, nothing of the kind. [211—151]

(Testimony of Peter D. Cornils.)

Q. You have a lot of laborers around there working?     A. Yes, sir.

Q. And you have them do the work that a laborer, a common laborer, can do?     A. Yes, sir.

Q. And whenever there is a job for a common laborer you see that a common laboring man does that?

A. Yes, sir.

Q. To save expense?     A. Yes, sir.

Q. And that was a common labor job to take that plank off, wasn't it?     A. Yes, sir.

Q. Then when this fellow got hurt you say that you went to him and said, "Why didn't you do as I told you to, take up that plank?"     A. Yes, sir.

Q. Now, when that occurred that was immediately after they had drawn him out of that building?

A. I do not know. He was sitting on the porch at that time.

Q. Didn't you see them drawing him out of the building?     A. No, sir.

Q. He was bleeding from the nose?

A. He was sitting at the wharf at that time.

Q. He was bleeding at the nose?

A. I did not see him bleeding at the nose.

Q. He was suffering, was he?

A. He might suffer.

Q. He was groaning aloud?

A. He was groaning, yes, sir. [212—152]

Q. And then you say that he said at that time that he forgot?

A. The way I understood him, "I do not know why I did it."

(Testimony of Peter D. Cornils.)

Q. Now, as a matter of fact you never spoke to him like that at all and he never made any reply to you, did he?     A. He made that reply to me.

Q. And as a matter of fact, sir, you had a release, trying to make him sign a release *realizing* the company from damage?

A. I never thought anything at all about it; it just slipped out of my mouth involuntarily, without thinking what I was saying.

Q. Didn't you have a release?

A. I don't know I had a release with me or not.

Q. Didn't you have a release Alstrum brought over there?     A. Sir?

Q. Didn't you have a paper for him to sign that Alstrum brought over?

A. I do not know Alstrum ever had a paper there for him to sign.

Q. Didn't he give it to you and didn't you try to get him to sign that release right there?

A. Not as I—

Q. And the foreman said go away, he is too sick a man to talk to?     A. Not that I can remember.

Q. Don't you remember that?     A. No, sir.

Q. As a matter of fact that is true, isn't it?

A. No, sir, not as I know.

Q. And you had the release for him to sign, didn't you?

A. I never had one, I never talked about a release.

[213—153]

Q. Charlie Lundgren pushed you away and said he is too sick a man, didn't he?



(Testimony of Peter D. Cornils.)

A. I don't remember he ever said anything of the kind.

Q. If that had occurred, would you have remembered it?     A. I might have.

Q. But you do not remember it now?

A. I don't remember it, no.

Q. Those are your instructions, are they not, when a man gets hurt?

A. No, sir, I have not any instructions along that line.

(By Mr. EVANS.)

Q. Mr. Cornils, how long would it have taken Godo to have taken his peevy and taken up that plank to get the measurement you wanted?

Mr. TEATS.—I object to that as immaterial.

(Objection overruled and exception allowed.)

Q. How long would it have taken to raise that plank up?

A. Probably would have taken maybe two or three minutes, all depending on how the plank was tightened down.

(Recess, after which the call being waived and the jury being present, the trial hereof is continued as follows:)

Mr. CORNILS, being recalled, continues his testimony as follows:

Cross-examination.

(By Mr. TEATS.)

Q. Was the elevator repaired during the month of April?     A. No, sir. [214—154]

Q. Wasn't it out of order during the month of

(Testimony of Peter D. Cornils.)

April and needed repairs?

Mr. EVANS.—That is objected to, and we move to strike it out because there is no complaint of it ever being out of repair at all.

The COURT.—Objection sustained.

Q. Was the time when the cable broke the only time the elevator was broken down during the year, from January to the time of the accident?

Mr. EVANS.—We object to that as immaterial.

A. What do you mean?

The COURT.—Objection sustained.

Q. Was the breaking of this cable the only time?

The COURT.—State the time you are speaking of.

Mr. TEATS.—From January to May?

A. That is the only time I know it was broken down.

Mr. EVANS.—I withdraw the objection. If you confine it to the breaking of the cable it is all right.

Q. This breaking of the cable was the only time that the elevator got out of repair during January, March, April and May?

Mr. EVANS.—We object to the question.

The COURT.—Objection sustained.

Q. Was the breaking of the cable the only time, the only time the elevator got out of repair from January to May?

Mr. EVANS.—We object to that.

The COURT.—That is the same question. Objection will be sustained.

Q. I will ask it in another way. Was the cable out

(Testimony of Peter D. Cornils.)

of [215—155] repair during January, February, March or April?

Mr. FLETCHER.—That is objectionable.

The COURT.—Objection sustained.

Mr. TEATS.—Exception.

The COURT.—Exception allowed.

(Witness excused.) [216—156]

**[Testimony of H. B. Clark, for Defendant.]**

H. B. CLARK, a witness called for and on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination.

(By Mr. FLETCHER.)

Q. State your name. A. H. B. Clark.

Q. And where are you employed now?

A. John B. Stevens Company.

Q. You were formerly in the employ of the Carstens Packing Company? A. Yes, sir.

Q. How long?

A. Three years, practically three years.

Q. And when did you leave their employ?

A. The 11th of November last year, latter part of October of last year.

Q. Now, were you there in the glue-house in May 1911, when Louis Godo got hurt? A. Yes.

Q. Whereabouts were you?

A. On the top floor.

Q. I will ask you how you heard of his getting hurt?

A. There is a question I cannot answer exactly. I either heard Louis, as we called him—I never knew

(Testimony of H. B. Clark.)

his last name—groaning down below or the man beside me heard him. At any rate as soon as we heard him we rushed to the elevator and rushed down. Whether I heard him groaning or whether someone else, I do not know.

Q. You got down there very soon? [217—157]

A. Immediately.

Q. Mr. Clark, I will ask you if Peter Cornils was there? A. Yes, sir.

Q. I will ask you whether you heard any conversation or remark made by Cornils to Godo at that time? A. I did.

Q. What was it?

A. As near as I can remember Mr. Cornils explained to Godo something like this: "What in the world were you doing under there?" or you had no business there, something to that effect.

Q. Do you recall what if anything Godo said in reply? A. Why, I do not.

Q. You do not pretend to repeat the exact words of the exclamation? A. No, sir.

Q. That is the substance so far as you are able to recall it? A. Yes, sir.

Q. I do not know this is a matter for us to go into, but it has been brought out. Did you see anybody there, Mr. Clark, Alstrum or anybody with any paper that purported to be a release or any paper that they wanted Godo to sign? A. No.

Q. Did you ever hear of any such circumstances?

A. I never heard of such a thing, no.

(Testimony of H. B. Clark.)

Cross-examination.

(By Mr. TEATS.)

Q. Who were there besides you?

A. Well, that is something I cannot answer. I can recall Mr. [218—158] Cornils, and I would not try to state who else was there.

Q. Could you name anybody else?

A. No, not with any definiteness at all; not to be sure of it myself.

Q. You do not know whether there were any men around there?

A. Oh, yes, there were probably 20 other men there.

Q. But you did not know anybody but Cornils?

A. That is a guess.

Q. And that is a guess?

A. I say the number twenty is a guess.

Q. That is what I say, that is a guess?

A. That is a guess.

Q. And who was there first?

A. I cannot answer.

Q. Where was Godo when you got down there on the wharf?

A. Just being pulled out from under the building, just as he was pulled out from under the building.

Q. Could he walk, did he walk?     A. No.

Q. Laid down on some planks there?

A. He was laying on the ground or planks, on the planking there as I came down.

Q. Where did this conversation occur, just as they took him out from under the building?



(Testimony of H. B. Clark.)

A. As he laid there on the planks.

Q. He laid there on the planks?     A. Yes.

Q. He was not sitting?

A. I would not try to recall that.

Q. You think he was lying on a plank. Did you notice him? [219—159]     A. Not especially.

Q. Didn't notice how pale he was?

A. I would not say I did; he looked very badly to me.

Q. He looked badly bruised up?     A. Yes, sir.

Q. And did he look as if he was conscious of what was going on around him?

A. Why, I would not try to answer that.

Q. Didn't look that way, did he?

A. I could not answer. He was groaning; he lay there groaning.

Q. And breathing hard?

A. I do not know anything about that.

Q. Didn't you notice it?

A. I would not try to remember it.

Q. Bleeding at his nostrils?

A. I do not recall that.

Q. But in a condition in which you would say that he would not understand what you were talking about? Did you say anything to him?

A. I could not say that.

Q. You would not say that?

A. I would simply say that he was very badly hurt. I have no way of answering your further question.

Q. You did not hear him say anything?

(Testimony of H. B. Clark.)

A. I do not recall it now.

Q. And you were close up?

A. Oh, yes, 10 or 15 feet.

Mr. FLETCHER.—Q. Do you know the names of the men working around the plant? [220—160]

A. Practically all the carpenters.

Q. But you cannot recall anybody that would be there?

A. I would not try. I think I can but I would not care to try.

Mr. TEATS.—Q. Did you see Dave Alstrum come up?

A. Well, I could not answer that. Dave always did—

Q. Were you there when the cab came after him?

A. I could not answer that. I was on the plant, but whether I stayed there or not I do not remember.

Q. You do not remember whether you were there when the cab came after him?

A. No, I do not recall it.

Q. Do you know who put him in the cab?

A. No, I could not.

(Witness excused.) [221—161]

**[Testimony of David N. Allstrum, for Defendant.]**

DAVID N. ALLSTRUM, a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. FLETCHER.)

Q. Your name is David N. Allstrum?

(Testimony of David N. Allstrum.)

A. Yes, sir.

Q. What business are you in?

Q. Printing business, just now.

Q. You were formerly with Carstens Packing Company?      A. Yes.

Q. When did you leave their employ?

A. The first of November, last year.

Q. You were in their employ in May, 1911?

A. Yes, I was.

Q. Mr. Allstrum, I show you several identifications here and I will ask you if you had them taken and were with the photographer when they were taken?

A. Yes, I was along when these were taken.

Q. Was Mr. Cornils with you?

A. Well, he appears in one or two of these photographs.

Q. Is that he in Exhibit 8?

A. Yes, that is Mr. Cornils.

Q. And again in Exhibit 6?

A. Yes, that is Mr. Cornils.

Q. Who is this in Exhibit 3?

A. That is myself.

Q. Do you recognize the space around under the floor of the glue-house, had you been under there prior to Mr. Godo's injuries?

A. Well, I had been there when the building was put up. I [222—162] do not recall I had been under there prior to the injury.

Q. Well, from the time it was put up to the time of his injuries, and the time these pictures were

(Testimony of David N. Allstrum.)

taken, I will ask you if you recall if there was any lowering of the floor of the glue-house?

A. The floor of the glue-house, the floor part was above the tide-flats, and the floor had not been lowered from the way it was built in the first place. The floor itself had not been lowered.

Q. About what space was there under the glue-house from the mud up to the floor?

A. I think it was less than, I think it was something less than six feet, because I had to stoop to go in there. It varied a great deal because in some places it was probably only two or three feet, while at other places it was higher.

Q. In going to the position where you were, around the different parts of the building from the outside of the building, how did you get into the position where you are in the exhibit?

A. Well, I could have gotten in, crawled in there.

Q. In Exhibit 1, the opening, the only opening that is shown under the building?

A. Yes, that is one opening there, right in there, and I could have crawled in here (indicating on picture).

Q. That is—

A. This is the new part of the building. This was built after the old plant; this was built later than the old part here. This part of the plant here was the new part. It was built since this part of the plant was built. [223—163] This part here as it stands out there is this part here, that corner over there is this corner here. (Witness compares two photo-

(Testimony of David N. Allstrum.)

graphs, exhibits in this case.) I could have crawled in there, which would be here, or here, which would be over there; I could crawl in there and go around or go that way from this side.

(Witness indicates and illustrates by comparing two photographs.)

Q. If you crawled in the space where you marked the one, how would you get to the position where you are shown on Exhibit 1?

A. I would go right through there, which would bring me in here and cross the beam there and get over (indicating on photograph).

Q. Suppose you had gone in back of the building?

A. I would go in on the other side of the beam, on that side of the beam (illustrating on photograph).

Q. If you had gone in the space on Exhibit 7 you speak of, you would not get anywhere near the counter-weight?

A. No, no, unless I would have crossed this beam here, but there would have been nothing gained, because there is an open space over here right in around where the elevator was.

Q. In Exhibit 8? A. There is an open space.

Q. All that space is open?

A. All that space is open.

Q. And if you had entered from the rear?

A. If I had entered from this side, yes.

Q. You would have gone right back to where Cornils is over [224—164] there without interfering with the elevator?



(Testimony of David N. Allstrum.)

A. Yes, if I had gone through there; yes.

Q. That is what I say, in Exhibit 7. Do you know when these photographs were taken?

A. I am not *sure the* exact date. I could tell by examining the records in the office, because we would have a file of that bill from the photographer that would show.

Q. I will ask you whether or not it was shortly after the suit was brought.

A. Oh, yes, I am not sure as to that; maybe it is before the suit is brought; I am not sure about that; I would not say for sure; I would not say for sure.

Q. This Exhibit 4 shows an opening marked B to the left of the elevator shaft and an opening marked B to the right. Did you ever know of those openings having been closed before Mr. Godo got hurt?

A. I do not think so.

Q. Did you ever know of any changes in these openings on either side?

A. No, sir; I am satisfied not, for the reason I believe these openings were left open on purpose so that all the men when they were putting in the counter-shaft could work around there. Otherwise they would have to have gone here to get on the inside of it. I believe those were left open on purpose.

Q. Do you recall any planking filling up this space just above the beam where figure 4 is marked on that photo?

A. Not particularly. There may have been some boards in there. If I recall right there were some

(Testimony of David N. Allstrum.)

boards in there on which we stood— [225—165]

Q. No, I mean closing up the space, planking up and down?

A. Oh, no, that was never filled up. I think that is a new part of the building.

Q. The opening, figure 4, and further out you think it is in the new part of the building?

A. I think it is. I am satisfied it is, because this elevator was constructed in the west end of the building and the addition was put on the west end.

Q. Do you recall ever noticing the counter-weights prior to Mr. Godo's injury as to whether or not they came below the floor of the glue-house, or whether you know anything about that?

A. You call the floor of the glue-house—

Q. Yes?

A. This is really the floor of the glue-house. This would not be considered the floor.

Q. No, this is ground, mud, but the floor is up above as you suggest? A. What is that question?

Q. I ask you whether or not you observed the counter-weights, as to whether or not they came below the floor prior to Godo's accident?

A. I could not say.

Q. Do you recall the breaking of the counter-weight cable, do you remember anything about that, and having it tied again?

A. No, I do not; not at the time it was broke. I was told about it afterwards.

Q. You do not know anything about that of your own knowledge? [226—166] A. No.

(Testimony of David N. Allstrum.)

Q. That was not in your department anyway?

A. No.

Q. I will ask you if you recall the date that Mr. Godo got hurt, the fact he did get hurt?

A. Well, I knew he got hurt, but I could not say now what the date was.

Q. I think it is agreed it was May 27th, 1911. Do you know how long after he was hurt before you saw him?

A. Well, I called on him once while he was up in the hospital.

Q. Do you remember seeing him at the packing-house before he was taken to the hospital?

A. Oh, yes; I saw him directly after he was injured.

Q. I will ask you if at that time you or anyone else presented any paper to him in the shape of a release or otherwise, with the request to have him sign the release or any paper at all?

A. No, sir; I did not.

Q. Did you ever hear of any such occurrence before?

A. No, sir; I never knew of any such thing.

Cross-examination.

(By Mr. TEATS.)

Q. At that time you held what position over there?

A. Assistant treasurer.

Q. And your work was in the office?

A. It was in the office, and the work also took me outside of the plant.

Q. How much outside of the plant?

(Testimony of David N. Allstrum.)

A. Well, whenever the occasion required. [227—167]

Q. And what sort of an occasion required the assistant treasurer to go outside?

A. Well, I had charge of the insurance, both fire and liability, so that whenever anyone was hurt it was reported to me at once and I investigated it.

Q. The fire, what did you have to do—

A. I simply mentioned the fire. I said insurance, and I described that by saying fire or liability.

Q. And if one of them was hurt you investigated it on account of your liability? A. Yes, sir.

Q. Casualty insurance?

A. Well, pardon me—there was no casualty insurance; we had none.

Q. You had none at that time? A. No, sir.

Q. Then you did not have any occasion to investigate it?

A. Oh, yes, we always investigate all accidents anyway.

Q. And at that time you were carrying your own liability?

Mr. EVANS.—We object to that as immaterial.

The COURT.—The objection is sustained and the jury is instructed to disregard all the witness has said concerning insurance in any way.

Q. So when a person was injured when you were there during May or during any period of time prior to this accident, your duty was to investigate the cause and so on? A. Yes.

Q. And make your reports?

(Testimony of David N. Allstrum.)

A. I always kept a report of it.

Q. And that was part of your duty? [228—168]

A. Yes, sir.

Q. But there was nothing in your duty that would call you under the glue-shed without something particularly happened?

A. Not unless there was some occasion for me going there, not outside of my duties.

Q. I see, but were you ever under the glue-house?

A. I was, yes.

Q. I mean before this accident?

A. I could not say that I was. I was probably. I was around there all the time when this place was built, and probably—

Q. That was built in 1906?

A. Yes, whatever year that was.

Q. And since that time you have not been under it?

A. I do not think I ever was under.

Q. So that when you stated that there were openings down below there you did not know whether they were openings at all down below there, up to the time you went in there to take these photographs to introduce in this case, did you?

A. Yes, I did. I will show you. This, as I said before—

Q. What exhibit is that?

A. That is exhibit Number 3. This a new part of the plant. This is here, over here at the west. That is the new part of the plant, and these beams were not there when the glue-house was built, they were simply put there after the new addition was put



(Testimony of David N. Allstrum.)

in there, after the glue-house had been turned into a tannery, and that was done afterwards.

Q. Was there anything out there on the west side of the house, the old glue-house?

A. Well, there was a wharf. [229—169]

Q. That is the wharf, that is down here along the railroad track (indicating on plat)? A. Yes, sir.

Q. Where that floor is? A. Yes, sir.

Q. Was there anything else there?

A. Well, they used to store different things as I remember.

Q. When?

A. Out in front there, store hay and stuff of that kind.

Q. On the wharf? A. On the wharf, yes.

Q. Was there anything else there except the wharf?

A. I do not recall that there was, no. Any other building, you mean?

Q. Yes, or anything else built under the structure?

A. Well, there was a runway from the door to the center of the house here, a run or incline runway.

Q. Inclined runway, which way did the incline run?

A. West, down towards the railroad tracks.

Q. That is all there was there? A. Yes.

Q. Now, what is the space between those posts (indicating on the photographs)?

A. I cannot say in feet and inches, but when we were down there taking the photograph I walked

(Testimony of David N. Allstrum.)

through that, and this space here was larger than this space here.

Mr. FLETCHER.—So that the record may show the space on the left of the elevator weight was a little larger than the space on the right?

A. Yes, as you were facing it, it would be left, yes.  
[230—170]

Mr. TEATS.—Q. How much larger?

A. I could not say exactly, but I could probably—well, I walked through here without any trouble. I do not know I attempted to walk through there or not.

Q. You could not get through, could you?

A. I am not sure, I cannot say, but I know the space here, I walked through it on purpose to see if I could get through.

Q. But you are a slender man?

A. I did not walk through sideways.

Q. You did not walk through the other way, square to it, did you?     A. It seems to me I did.

Q. You did?     A. Yes.

Q. Now, Mr. Allstrum, you had to go sideways to get through, didn't you?

A. No, I don't remember I had.

Q. How far are you between the shoulders?

A. I do not know.

Q. You are about 16 inches anyway, aren't you?

A. Yes, I guess I am; is that 14 inches there?

Q. Yes, sir. You could not get through there without going sideways?

A. Of course, it is a long time ago; I could not say

(Testimony of David N. Allstrum.)

for sure; I think I went through there and had no trouble going through there.

Q. You do not know what that space is left there for?     A. Well, it is my—

Q. You do not know as a matter of fact from your own knowledge.   [231—171]

A. I am not a carpenter, but it is my recollection it was left there to allow the men to work in there.

Q. So that when you stated to the jury that was left there for the people to go through there when they were installing them, you did not know what you were talking about, isn't that a fact?

A. No, that is not, for the reason that is what I had been told by the carpenter that was working there.

Q. What you say, then, is what you were told. As a matter of fact you do not know from your own knowledge why that is there?

A. I know from observing and by being told by people that were practical carpenters.

Q. How long were they working there?

A. Well, I could not say, probably the time it took to put in the elevator.

Q. As a matter of fact, there was a platform all the way along there that enclosed this space here so that you could not see that at all from about 1906 up to the time when they tore it down and put on that new addition, isn't that a fact? Do you remember that platform all the way along there?

A. There may have been a platform.

Q. Yes; and that platform was about six feet.

A. I did not pay any particular attention to these

(Testimony of David N. Allstrum.)

things. I had no occasion to.

Q. You are trying to testify here as to the absolute facts, and what I want to get at is whether you know what you are testifying about or not.

The COURT.—Don't shake the ruler at the witness. [232—172]

Q. So that if that platform was there during all this period of time you do not remember it?

A. Wouldn't that have been left there when they took that platform away, isn't that condition left there, wasn't that there all the time the platform was there?

Q. I do not know. I am asking you.

A. Well, I say as I said before, I was never under there until after the accident.

Q. So that you don't know anything about what was under there until after the accident?

A. I know it had been boarded up a long while, because the cobwebs and things showed it had been there, and it had not been broken off, the boards had not been broken off, so that they were left there on purpose, left open on purpose.

Q. Now, who took these photographs?

A. Avery & Potter; I do not know which one, whether it was Avery or Potter, one of the two.

Q. Avery or Potter? A. One of the two, yes.

Q. They were taken sometime in August?

A. I could not say as to that.

Q. They are what they call flashlights, aren't they?

A. They are flashlights, yes.

Q. Who is Potter?

(Testimony of David N. Allstrum.)

A. Well, they are photographers, commercial photographers, Avery & Potter.

Q. They are a firm, Avery & Potter?

A. Avery & Potter, yes.

Q. Are you the only tall, slim, good-looking man in the [233—173] office during May?

Mr. EVANS.—We object to that as immaterial.

The COURT.—Objection sustained.

Q. You say that you went out after the accident and were there when they first took him out from under the building?

A. No; I did not; when I got out there he was out on the wharf.

Q. Lying down on these planks?

A. It seems to me he was sitting on the wheelbarrow.

Q. On a wheelbarrow?

A. Either a wheelbarrow or truck, one of these flat trucks. It seems to me he was on it.

Q. Any other man employed by the company at that time who had charge of getting releases from employees?

Mr. EVANS.—We object to that as immaterial, and not proper cross-examination.

The COURT.—Objection sustained.

Mr. TEATS.—Exception.

Mr. FLETCHER.—Let him answer.

Mr. EVANS.—Go ahead; we will withdraw the objection.

The COURT.—The objection having been withdrawn, you may answer.



(Testimony of David N. Allstrum.)

A. To my knowledge, there were never any releases ever asked of anyone. I have taken affidavits.

Q. That is not the question. Was there anyone there in your office who had charge of getting releases from the men who were injured? A. No, sir.

Q. At that time, except yourself? A. No, sir.

Q. Was it you that brought out a paper for him to sign, did [234—174] you bring a paper out for him to sign at the time of the accident?

A. No, sir; I do not believe I did. I am satisfied I did not. I never had any such instructions.

Q. Were you there when the cab came for him?

A. Yes, I was.

Q. As a matter of fact, didn't you hand a paper to Mr. Cornils, and Pete went and undertook to have Godo sign it—

The WITNESS.—Oh—

Q. And Charlie Lundgren says, "Now, he is too sick to sign it"?

A. Yes, I will tell you what that was. He was sent off to the Tacoma Private Sanitarium Hospital, and we had an application card; at least, not an application card, but an identification card, and whenever anyone was sick or hurt we would write their names down there, and on the back of that card was wording something to this effect, it is a sort of identification card, and says,—“I hereby agree to abide by the rules of the Tacoma General Hospital,” giving the name of the holder. When a man goes up there for admission he has to sign that slip of paper, about that big (illustrating). That was the slip of paper that was

(Testimony of David N. Allstrum.)

sent to him to sign.

Q. And he was unable to sign it on account of being in that condition?

A. Yes. That paper was not a release at all, but simply an identification slip and intended for the purpose of identifying the applicant to the hospital.

(Witness excused.) [235—175]

**[Testimony of Peter Cornils, for Defendant  
(Recalled).]**

PETER CORNILS, being recalled, continues his testimony as follows:

Direct Examination.

(By Mr. EVANS.)

Q. Look at Defendant's Identification 3. I will ask you how wide the space is, the first space as you go under the new building next to the counter-weight?

A. You mean from the elevator up?

Q. I mean this space here. (Indicating on exhibit.) A. Sixteen inches.

Q. How wide is the one on the other side?

A. Fourteen inches.

Cross-examination.

(By Mr. TEATS.)

Q. Who made this blue-print, Exhibit 5?

A. I did.

Q. Are the spaces you have been testifying to spaces that are marked on this map? A. Yes, sir.

Q. These are the two spaces (indicating)?

A. Yes, sir.

Q. On this map you say that it is 14 inches and 12

(Testimony of Peter Cornils.)

inches. That is all?

A. One foot two and one foot four.

Q. One foot and one foot two. This one that is one foot two you say is sixteen?

A. And that is 14.

Q. And this is one foot?

A. Yes. I got it there, 16 and 14 inches. [236—176]

(Counsel refers to blue-print and figures thereon.)

Redirect Examination.

(By Mr. EVANS.)

Q. I show you Defendant's Identification 9, and ask you what that is?

A. That is a view taken, you know, from the west side towards the east, facing the elevator.

Q. Does that show the counter-weight space and the other space on the sides? A. Yes.

Q. Who made that? A. I did.

Q. Now, can you tell from your recollection and your measurements what both of those two spaces was? A. It shows right here.

Mr. TEATS.—We object to that. He has got the exhibit here that he says is correct.

The WITNESS.—So it is.

The COURT.—Objection overruled.

Q. Go ahead.

A. It shows one foot and two inches between the measurements on one side, and it shows one foot and four inches over there. It shows one foot and two inches from here, from this side of the guidepost, and one foot and four inches from here.

(Testimony of Peter Cornils.)

Q. Is that correct?

A. Just as I recall it, yes, sir. I took the measurements at that time over there.

Mr. EVANS.—We offer this in evidence. [237—177]

Thereupon said Identification No. 9 is received in evidence by the Court and marked as Defendant's Exhibit No. 9.

(By Mr. TEATS.)

Q. You took the measurement when you made the other exhibit, too, didn't you?

A. Just exactly the same thing over there.

Mr. TEATS.—No, it is not.

(Witness excused.) [238—178]

**[Testimony of Charles S. Lundgren, for Defendant.]**

CHARLES S. LUNDGREN, a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination.

(By Mr. EVANS.)

Q. State your name to the Court and jury.

A. Charles S. Lundgren.

Q. Where do you live?

A. McKinley Park Addition.

Q. What is your occupation?

A. Millwright foreman at Carstens.

Q. Employed at Carstens? A. Yes, sir.

Q. How long have you worked there?

A. It will be five years in January.

Q. You were working there at the time Mr. Godo was injured in May, 1911? A. Yes, sir.

(Testimony of Charles S. Lundgren.)

Q. Were you working there at the time the cable broke that the counter-weight of the elevator was attached to?     A. Yes, sir.

Q. What position did you hold over there?

A. I was foreman of the carpenters.

Q. State if you can, when the cable broke and let the counter-weight down.

Mr. TEATS.—That is from your own knowledge, just from what you know and not from what somebody told you.

Q. When was it, if you know?

A. I do not know without referring to the time-book.

Q. Did you keep the time yourself?

A. I kept the time, yes, sir.     [239—179]

Q. Did you make the entries in it yourself?

A. Yes, sir.

Q. I hand you this book; what is that book?

A. That is the time-book.

Q. Whose writing is it?     A. Mine.

Q. You made all the entries in there?

A. Yes, sir.

Q. Can you look at the time-book and tell, from that, can you tell when the— Did you note in the time-book at the time this work was done what the different men were doing?     A. Yes, sir.

Q. Were those entries made at the time the work was done?     A. Yes, sir.

Q. Can you look at that time-book and tell when the repairs to the counter-weight were made, and the counter-weight was put back?     A. Yes, sir.



(Testimony of Charles S. Lundgren.)

Q. When was it?

Mr. TEATS.—I object to that. I would like to examine the witness on the entries.

The COURT.—I will overrule the objection—you may examine.

(By Mr. TEATS.)

Q. Where did you gain the information you put upon these books? A. I kept track of them.

Q. Where did you gain the information?

A. I do not quite understand.

Q. For instance, on here it says—what is this?  
[240—180]

A. Sherman.

The COURT.—Are you going into the contents of the book?

Mr. TEATS.—This goes to the rest of it.

Q. Where did you gain the information as to that?

A. I worked at that myself.

Q. That is your own time-keeping? A. Yes.

Q. You hired a man by the name of Beyers?

A. Yes, sir.

Q. Where did you get the information as to what he did?

A. Because I was overseeing him, so I knew where they were working at the time.

Q. Were you overseeing these particular two men or all of the men in the plant?

A. Overseeing the carpenters.

Q. All of the carpenters? A. Yes, sir.

Q. When would you make the entry in the book?

A. In the evenings.

(Testimony of Charles S. Lundgren.)

Q. At evenings?     A. Yes, sir.

Q. And would you sometimes take that from their word or would it always be from your own observation?

A. Well, it is generally from my own observation. I knew where they were at.

Q. And then sometimes from their words?

A. Well, it would be, it might have been some instance. I do not know of any.

Mr. TEATS.—I want to look at the book, if the Court please.

Mr. EVANS.—Q. How many carpenters did you have working under [241—181] your direction?

A. Sometimes there has been up as high as twenty or twenty-three.

Q. Along in the winter of 1911 how many did you have, approximately?

A. Somewhere in the neighborhood of 20; I could not tell exactly.

Q. When was it that they made those repairs?

A. On the 16th and 17th.

Q. Of what month?     A. The first of January.

Q. 1911?     A. 1911, yes, sir.

Q. Who did the work?

A. Mr. Beyers and Mr. McArthur.

Q. Is that a record of their time?     A. Yes, sir.

Mr. EVANS.—We offer the book, this page.

Mr. TEATS.—We object to the offer of the book, if the Court please.

The COURT.—The objection is sustained to the offer of the book.

(Testimony of Charles S. Lundgren.)

Mr. TEATS.—Q. Where in this book—

Mr. EVANS.—Wait a minute, I am not through. He sustained your objection.

Mr. EVANS.—Q. Was that cable ever broken after that to your knowledge? A. No, sir.

(Books are examined by the Court.)

Mr. EVANS.—I submit, if the Court please, that book is [242—182] decidedly a book of original entry, the book in which all the charges were made to show where the work goes. It is the very best evidence, and the notes were made on there to show at the time what these men were doing.

The COURT.—That is what I am trying to examine it for. If it is simply a time-book the objection would be sustained, because there is not anything to show except the entry.

Mr. EVANS.—Q. Did you know all the time, as you went along, what work the men were doing?

A. As far as I could.

Q. Did you say in this book the peculiar work that Beyers and the other man were doing, and does it indicate the work done on the repair of the cable?

A. Yes, sir.

Q. When did you do that, at the time?

A. I done that in the evening.

Q. On the day that they worked?

A. On the day that they worked.

Mr. EVANS.—We renew our offer, if the Court please.

(By the COURT.)

Q. Was it your custom to enter in the book the

(Testimony of Charles S. Lundgren.)

work that the particular men were engaged in, as to the time they occupied?     A. Yes, sir.

The COURT.—The objection is overruled.

Thereupon said page of the time-book is received in evidence by the Court and marked as Defendant's Exhibit Number 10.

(By Mr. TEATS.)

Q. Is there any entry here that shows what kind of repair [243—183] they did on the elevator?

Mr. FLETCHER.—Q. Do you know when the ringer foundation was built?

A. It was some time in April, I think.

Q. Of that same year?     A. Of that same year?

Q. Can you show that from the book?

A. Only as construction work.

Q. Take this book and see if you can find it. What is that book?     A. That is a time-book.

Q. Another time-book?     A. Another time-book.

Q. A record kept by you?     A. Yes.

Q. Look at that book and see if you can refresh your memory and tell us when the ringer foundation was put in. Do you know what work Mr. Godo was at there at the time the ringer foundation was built?

A. Yes, sir.

Q. What was he doing?

A. I remember he put it in there.

Q. He put it in?

A. Yes, that is, he built the forms. I just have him here as "wool-puller construction."

Q. You did not keep separate track of foundation.

(Testimony of Charles S. Lundgren.)

A. No, it was all construction work. I just had it construction.

Q. Was there any other wool-pulling construction at that time? A. Yes, sir. [244—184]

Q. Building the new addition?

A. Building the new addition, yes.

Q. When was that done?

A. That was done in April.

Q. And this ringer foundation was constructed at the same time or near the same time that the other work was done? A. Yes, sir.

Q. It was all a part of the one job? A. Yes, sir.

Cross-examination.

(By Mr. TEATS.)

Q. There is nothing in this item which shows what repair they did in the elevator?

A. No, only just elevator repair.

Q. Now, have you the time of Mr. Beyers and Mr. McArthur for April and May? A. Yes, sir.

Q. Where is it?

A. It is in that book. (Referring to second book.)

Q. I will ask you whether or not they repaired the elevator more than once during January, February, March, April and May?

A. That I do not know unless I go through the time-book.

Q. You do not know only as you go through the time-book? A. No, I do not remember.

Q. The question is where is the time of Beyers and McArthur for April and May?

A. This is fertilizer repair (referring to book).



(Testimony of Charles S. Lundgren.)

Q. What do you mean by that, fertilizer repair?  
[245—185]

A. Repair work done in the fertilizer plant.

Q. Is that all of April?

A. That is the beginning of April.

Q. What is that (referring to book)?

A. Repairing cooler door.

Q. Now, where they do their work on two or three jobs during the day you would not put it all in one in that book?

A. Generally kept fertilizer in the packing department, and wool-puller separate against the glue-house, and entered all of them separately.

Q. So that in this particular item of January I see you have only six and a half hours or something like that for the man on that work; what did he do the rest of the day?

A. Well, the rest of the day they were at something else.

Q. But not put in the book?      A. Yes.

Q. Are they in the book?

A. I think so, if they were there.

Q. "Glue-house elevator," Exhibit 10, what is three and a half for?

A. Three and a half is the next day; half hour there and half hour there and one hour there.

Q. For what?

A. One hour for packing-house repair.

Q. Is that all one day?

A. That is all one day, down this way (indicating).

Q. That is all one day. Then where is the time

(Testimony of Charles S. Lundgren.)

from here? For instance, each one of these is just one day. Those you have shown made only one day.

A. Here is each a day there, here is Sunday. They worked one [246—186] day there, Sunday, eight hours “fertilizer,” and the next day, Monday, would be six hours “fertilizer conveyer,” and here is two hours, “fertilizer dryer.”

Q. Let me understand that. Each column of figures represents a day?

A. Yes, a day's work is in each column.

Q. Over here they worked eight hours on the fertilizer? A. Yes, sir.

Q. And the next day six hours? A. Yes, sir.

Q. On the “fertilizer” and then again five and so on? A. Yes.

Q. And the same way all the way down?

A. Yes, sir.

Q. So that if you did work here for instance six hours, what did you do the rest of the day?

A. Well, he had two hours for “fertilizer dryer,” with one underneath the same date.

Q. Now, where are the times for April and May for these two men?

A. They are in this book here. (Indicating the second book.) Do you want to know what they were doing altogether?

A. What they were doing altogether, or whether they were working in the elevator?

A. It is all here.

Q. Now, as far as you know the item in January might have been some other repair of the elevator,

(Testimony of Charles S. Lundgren.)

except the cable, as far as you know?

A. No, it could not very well have been.

Q. Why? [247—187]

A. Because it was broke down about that time of the year.

Q. Do you remember it being broken down about the latter part of April? A. No, sir.

Q. As a matter of fact it was broken down there for about half a day or a day about the latter part of April or first of May? A. No, sir.

Mr. EVANS.—That is objected to unless it is applied to the cable or counter-weight.

The COURT.—Objection overruled.

Mr. EVANS.—Exception.

Q. You have there “wool-pulling plant,” what was that? A. That was construction work.

Q. Could you tell what it was?

A. No, just only they were put in the wool department there.

Q. Now, what is the idea of putting the work that they did there?

A. They segregated it at the office.

Q. Charged it up to the separate plants?

A. Separate departments.

Q. What does this mean here?

A. Packing company repair.

Q. What is that? A. “Fertilizer” repair.

Q. Now over here is wool-puller repair?

A. Wool-puller repair.

Q. What is the other?

A. That is wool-puller construction; it is a differ-

(Testimony of Charles S. Lundgren.)

ent amount. [248—188]

Q. Were Beyers and McArthur working there a year before this accident, that would be May, 1910?

A. I think they were.

Q. What is this? A. Wool-puller.

Q. What is that work? A. Construction work.

Q. There is nothing there to show it is construction work? A. There is down here.

Q. Down below there is, but not above?

A. They both worked together.

Q. What is this, fertilizer repair?

A. Fertilizer repair; yes.

Q. And that is on what date?

A. That is on May 27th, the week ending the 27th.

Q. The week ending May 27th? A. Yes, sir.

Mr. FLETCHER.—1912? A. 1911.

Mr. TEATS.—Q. Then what was Godo doing on that date?

A. On the 27th he was, part of the day he was working on the coffer dam and two hours at the wool-puller.

Q. That was the day he got hurt? A. Yes, sir.

Q. So that you have wool-pullers all through here, and I see the wool-puller plant had only been constructed for about sixty days, hadn't it?

A. Well, it was under construction then.

Q. Still under construction?

A. Yes, sir. [249—189]

Q. And whenever these men did any work in April and May on the wool-puller, you charged it up to the wool-puller, didn't you? A. Yes.

(Testimony of Charles S. Lundgren.)

Q. As a matter of fact, Mr. Lundgren, if they had made any repairs there on the elevator during April or May you would have charged it up to the wool-puller? A. Charged it up to the glue-house.

Q. The glue-house had been eliminated, hadn't it?

A. It had been eliminated—it would have been charged to the glue-house.

Q. So that when you made any repairs you charged everything up to the wool-puller; that is when they made any repairs on that place at that time, in April and May, you would charge everything up to the wool-puller? A. No.

Q. Doesn't that book so show?

A. If it was repair work it was charged up—

Q. To the wool-puller? A. Yes, sir.

Q. And before that it was charged up to the glue-house? A. Yes, sir.

Q. Now, they might have made these repairs in April or May and you just simply charged it up to the wool-puller, repairs to elevator?

A. No, I might have made a note of it being elevator repair.

Q. You did not make any note. You did not make any note particularly of this part of the device called the foundation, called that wool-puller construction, didn't you? [250—190] A. Yes.

Q. This whole plant was wool-puller plant at that time? A. We were changing it into a wool-puller.

Q. Changing it from a glue-house into a wool-puller because you had gone out of the glue business, isn't that a fact? A. Yes, sir.



(Testimony of Charles S. Lundgren.)

Q. So that you could have made repairs on the elevator there in April and May and just simply charged it up to wool-puller, couldn't you?

A. Of course it could have been done.

Mr. EVANS.—Q. You did not do it though, did you? A. Not to my knowledge I did not.

(By Mr. TEATS.)

Q. Might have done it, Mr. Lundgren; might have done it, Mr. Lundgren.

Mr. FLETCHER.—We object to the question. It is a matter of argument.

The COURT.—The question has been answered. The objection is sustained.

Mr. TEATS.—I wish to offer the time-book in relation to all the work done by McArthur and Beyers during the months of April and May.

Mr. FLETCHER.—It is all given together. I will supplement his offer and offer the whole book, which will show what he wants as well as what the jury will want to find out, perhaps.

The COURT.—It should be sealed in some way so that that part of the book—

Mr. FLETCHER.—It runs all through the book.

The COURT.—Very well, there being no objection the whole book [251—191] will be admitted.

Thereupon said book is received in evidence by the Court and marked as Defendant's Exhibit Number 11.

Mr. FLETCHER.—In regard to Exhibit Number 10, I will leave a mark at the page—the pages are

(Testimony of Charles S. Lundgren.)

not numbered—that the witness was examined in regard to.

The COURT.—That was in January.

Mr. FLETCHER.—That was in January.

Direct Examination (Continued).

(By Mr. EVANS.)

Q. There are a few questions on direct I would like to ask this witness: You have been under the glue-house there? A. Yes, sir.

Q. Did you make any measurements down there to ascertain the width of the two uprights or guides that the counter-weights run in? A. Yes.

Q. How wide are they?

A. Not the weights, no, sir; I did not measure the weights.

Q. Did you measure the width of the space on either side of it? A. No, sir, I did not measure it.

Q. Now, did you measure the distance from the sill up to the floor?

A. I measured the distance from the mud up to the joist, yes, sir.

Q. That is shown on this Exhibit 3, from the mud underneath [252—192] up to this joint at the top in the seats where the counter-weights run.

A. Yes, sir.

Q. What is the distance? A. It was 60 inches.

Q. What is the condition under the glue-house there as to being open or obstructed?

A. It is open.

Q. Are there any obstructions under there outside of the well of the elevator and the uprights that the

(Testimony of Charles S. Lundgren.)

counter-weight runs in?

A. No, sir, not to my knowledge there ain't.

Q. Did you measure this space in Exhibit Three where you see Allstrum's picture, this space between these two joists?

A. No, sir, I did not measure that.

Q. Approximately how wide is the space, do you know?     A. About four feet, I think.

Q. Had you been under there before the accident to Godo?     A. Yes, sir.

Q. Familiar with the conditions under there?

A. I never took any particular notice.

Q. It is open there on figure 3 where you see Allstrum, or is it not?     A. I think it was.

Q. Were there two openings there on the side of the counter-weights?     A. I think so, yes, sir.

Q. Now, showing you this photograph, Defendant's Exhibit 2, I will call your attention to this blue pencil square on it. [253—193]     A. Yes, sir.

Q. If a man went under there he would come right face to face with this place on 3 where Allstrum is, wouldn't he?     A. Yes, sir.

Q. Go straight ahead and step over that beam?

A. Yes, sir.

Q. Would he then have clear space around there or was there anything in the way?

Mr. TEATS.—We object to that as leading.

The COURT.—Objection overruled.

Q. Was there anything to obstruct him after he got over there, over the beam marked 3?

(Testimony of Charles S. Lundgren.)

A. No, sir.

Q. What is that picture?

A. That is the basement.

Q. Is this Exhibit 7 I hand you below the wool-pullery?     A. Yes, sir.

Q. Could go under the building from there, could you?     A. Yes, sir.

Q. What other ways could you go under?

A. From the inside there was another route, but I never went down there myself.

Q. Now, did you know anything about what was done down there at the time they did the work on the ringer foundation?     A. Yes, sir.

Q. Who placed the trough that was put down there?     A. I do not remember who placed it.

Q. Do you know where it was placed?

A. Very near. [254—194]

Q. How was it placed with regard to the space where the counter-weights run down, the two up-rights, did it go out between those uprights or not?

A. I do not think so.

Q. If it had, the counter-weights would have come down on it, wouldn't it?     A. Yes, sir.

Mr. TEATS.—I object to that.

The COURT.—Objection sustained.

Q. Were you back in back of the elevator along the foundation as shown by Exhibit "H"?

A. Yes, sir.

Q. How does the foundation go down in reference to the mud?

A. Why the sill goes close to the mud.

(Testimony of Charles S. Lundgren.)

Q. Did you ever know of anybody going under that counter-weight there between those uprights?

A. No, sir.

Q. Did anybody have any occasion to go through there that you know of?

A. Not to my knowledge.

Cross-examination.

(By Mr. TEATS.)

Q. Before the construction of this new building, the new addition, you went through this way to get under the things as a rule?

A. There was an opening there, yes, sir.

Q. Sort of door?      A. Yes.

Q. But when they constructed this new building that was [255—195] taken away?

A. No, sir.

Q. That was taken away. Hasn't that platform been taken away?      A. No, sir.

Q. Is it still there?      A. Yes, sir.

Q. And the door there?

A. There is a hole there, yes, sir.

Q. Was the hole there, and the boards boarded up and down there?      A. Part of them.

Q. Then you have to crawl thirty feet practically, pretty near thirty feet on your hands to get to this door, wouldn't you have to if you went through from the west side of the building?

A. The width of the building.

Q. Otherwise you just simply got down through



(Testimony of Charles S. Lundgren.)

that hole there and got on through if you wanted to go in, that would be the best way, wouldn't it, after the building was completed, as it was on the 27th of May last, 1911?     A. It would be shorter.

Q. It would be a better way, wouldn't it. In other words when they built this—

Mr. EVANS.—We object to that. Let the witness answer the question.

Q. It is a better way, isn't it?

A. It would be a quicker way to get in there.

Q. You could walk after you got through that hole, walk pretty near straight up, couldn't you? [256—196]     A. Pretty near, yes, sir.

Q. And then a person going through there would naturally pass through one of these openings, wouldn't he, if he wanted to get into this other department here?

A. I do not know whether they would or no.

Q. That would be the natural way to go wouldn't it, wouldn't it?

A. I don't know whether it would be or not.

Q. You would not climb over the sill to go along through here into this mud and make a long route through that mud, would you?

A. Well there is not as much mud as there is going through the other way.

Q. It is all mud through here, isn't it?

A. No, not altogether it is not. It is so that you can stand on it.

Q. And you could go through some of those places up to your hips in the mud, wouldn't you?

(Testimony of Charles S. Lundgren.)

A. Yes.

Q. Go in the rat holes? A. Yes, sir.

Q. You did not see this trough when it was placed whether it was through that opening or not, did you?

A. I do not remember.

Q. It could go through that opening, the opening is big enough, isn't it?

A. It is big enough, but it would have been broken if it had.

Q. But the opening is big enough to stick the trough through?

A. You mean between the elevator guides?

Q. Yes, sir. A. Yes, sir.

(Witness excused. Adjournment.) [257—197]

November 27th, 1912.

The call being waived and the jury being present, the trial of this cause was continued as follows:

CHARLES S. LUNDGREN, being recalled, continues his testimony as follows:

Direct Examination (Continued).

(By Mr. EVANS.)

Q. Mr. Lundgren, did you make any examination of the uprights and guides of the elevator shaft with a view of ascertaining how high the counter-weight formerly travelled? A. Yes, sir.

Q. Did you take any measurements at that time, since the change, or was there anything on the track or guide to indicate where the counter-weight formerly ran to, how high? A. Yes, sir.

Q. What is the condition?

A. The wear of the guides.

(Testimony of Charles S. Lundgren.)

Q. Does it show on the guide? A. Yes, sir.

Q. Was there anything above where they ran to indicate exactly where it stopped?

A. The guides are above the frame-work and the guides and the whitewash up above.

Q. They were whitewashed up above? A. Yes.

Q. And from that you are able to state where the counter-weight formerly run to?

A. Yes, sir, practically. [258—198]

Q. The counter-weight as now constructed runs to the top? A. Yes, sir.

Q. Did you take a measurement beneath the joists at the bottom to ascertain how far down the counter-weight runs? A. Yes, sir.

Q. What is this, what does this little bottle represent?

(Referring to model just brought before the jury.)

A. It represents the guide and counter-weight.

Q. Has there been any change in the distance that the elevator itself travels? A. No, sir.

Q. The elevator now travels the same distance it did before? A. Yes, sir.

Q. What is the difference now in height that the counter-weight travels from what it travelled before?

A. Thirty-eight inches.

Q. Then do I understand you at this time that the counter-weight stopped 38 inches above where it stopped before? A. Practically 38 inches.

Q. Can you illustrate with this model to the jury where the counter-weight travelled before and where it works to now? A. Yes, sir.

(Testimony of Charles S. Lundgren.)

Q. I wish you would do so.

(Witness demonstrates on model.)

A. That is practically where it goes now.

Q. I will mark with an AB a line that indicates where the counter-weight travels to.

A. At the present time.

Q. At the present time at the top? [259—199]

A. Yes, sir.

Q. Where does the track indicate it formerly ran?

A. About like that (demonstrating).

Q. Where I now mark CD. The difference between those two is how much?

A. About 38 inches. No, over forty.

Q. What does this piece marked joist 3 by 12 represent?

A. That is just the floor joist at the bottom.

Q. How much does the counter-weight now travel below the joist? A. Fifty-eight inches.

Q. How much then did the counter-weight formerly travel below the floor?

A. The difference between these two points subtracted from that would represent the difference.

Q. Twenty inches? A. Twenty inches, yes, sir.

Q. Was anyone with you when you made those measurements? A. Yes, sir.

Q. Who was it? A. Joe McMillan.

A JUROR.—Q. Was there twenty inches below the bottom of the 3 by 12 joist or 20 inches below the top? A. Below the bottom.

(By Mr. EVANS.)

Q. Can you take this and demonstrate how that

(Testimony of Charles S. Lundgren.)

would appear on the old counter-weight when it was all the way down before?

(Witness illustrates.)

Q. It would appear at the mark below the piece marked joist [260—200] 3-12, which I now mark with EF, is that correct? A. Yes, sir.

Q. Assuming that is 20 inches? A. Yes, sir.

Q. That represents the 20 inch mark?

A. Yes, sir.

Q. Is that model built to a scale?

A. Well, not to an absolutely close scale; it is pretty near scale.

Q. What scale? A. An inch to the foot.

Q. That was built more to illustrate?

A. To illustrate with, yes.

Cross-examination.

(By Mr. TEATS.)

Q. You were there when the elevator was put in?

A. No, sir.

Q. When did you go there? I thought you were there at work for the company when the elevator was installed. A. No, sir.

Q. When did you go to work as to that time?

A. It would be five years ago January when I went to work.

Q. Five years in January? A. Yes, sir.

Q. Did you ever see that counter-weight work—

Mr. EVANS.—That is objected to as not proper cross-examination.

The COURT.—Objection overruled.

Mr. EVANS.—Exception.



(Testimony of Charles S. Lundgren.)

Q. Did you ever see that counter-weight work up and down? [261—201]

A. Why I have through the boards.

Q. How?

A. I have through the boards on the floor.

Q. Down on the floor? A. Yes, sir.

Q. Did you ever see it work up above?

A. No, sir.

Q. Never saw it work up above? A. No, sir.

Q. Then your measurements up there is not the measurement as to the height it goes up to the point now? A. Yes.

Mr. FLETCHER.—What is that question?

Mr. TEATS.—Q. The question was you measured the height the weight goes up on the guides at this time? A. Yes, sir.

Q. Do you know whether they went up further than that? A. Why the wear on the guides.

Q. The wear on the guides? A. Yes, sir.

Q. Where is any wear on the guides?

A. From the weights or irons. It shows on the top of the guides.

Q. How is that?

A. By the wear from the counter-weight on top of the guides it shows.

Q. It shows the wear where it used to be?

A. Up above where the weights are now.

Q. Above? A. Yes, sir. [262—202]

Q. Do you know when that wear was made?

A. It must have been—

Q. Do you know when that wear was made?

(Testimony of Charles S. Lundgren.)

A. I do not know when it was made.

Q. You do not know but what the wear that was made up there might have been made a long time ago?    A. It is possible.

Q. And you do not know but what the elevator might have went up to this point or to that point before the cable broke (indicating)?    A. Yes, sir.

Q. So that it is a matter of speculation as to where that weight came down below, isn't it?

A. No, I do not think so.

Q. How?    A. No, I do not think so.

Q. You do not know as a matter of fact whether these weights went down below that beam or not, do you?

A. Only from the measurement from the top.

Q. From the measurement in the top and the measurements of the top you do not know whether that wear was before or at any time before this change was made—it might have been made another time, mightn't it?    A. The wear at the top?

Q. Yes?

A. I do not quite understand your question.

Q. What I mean is that the wear, how does the wear on the top compare with the wear below this mark?

A. It is pretty near the same thing, not quite as much.

Q. Pretty near the same thing? [263—203]

A. Yes.

Q. You say that there is some wear there?

A. Yes, sir.

(Testimony of Charles S. Lundgren.)

Q. And from that you are just simply guessing that it must have went up there at one time?

A. No, I am not guessing. It had to be up there to wear it.

Q. You say that is 37 inches, didn't you?

A. Yes, sir.

Q. That would produce the weight down here about twenty inches?     A. Yes, sir.

Q. Below the joists?     A. Yes, sir.

Q. That joist is 12 inches?     A. Yes.

Q. And 20 is 32 inches?     A. Yes, sir.

Q. What makes the other six inches. Where do you get your other six inches?

A. The distance is 58 inches.

Q. How is that?

A. The distance is 58 inches below the joist at the present time.

Q. But you say that it went down below 20 inches below, didn't you?     A. Yes, sir.

Q. And the joist is 12 inches, isn't it?

A. It is below that joist now.

Q. I am not talking now. Your proposition is that this elevator went below the joist, that is what you are trying [264—204] to prove ain't it, before it was repaired?     A. Yes, sir.

Q. Isn't that what you are trying to prove?

A. I think so.

Q. There is 20 inches down there?     A. Yes, sir.

Q. And there is 12 inches here, isn't there?

A. Yes, sir.

Q. That is 32 inches?     A. Yes, sir.

(Testimony of Charles S. Lundgren.)

Q. And yet there is a space here of 38 inches, isn't there?     A. Yes, sir.

Q. What become of the other six inches?

A. Added on to the joist.

Q. You gave the joist 12 and 20.     A. That is 32.

Q. And this is 38. Then what?

A. The measurement is from 58 inches below the joist.

Q. You don't understand me or I don't understand you. Your proposition is according to the length here there was 38 inches difference?

A. At the top.

Q. That is all.     A. Yes, sir.

Q. In other words it is 38 inches in all?

A. Yes, sir.

Q. Now; this thirty-eight inches you say is what?

A. Is deducted from the 58 inches.

Q. This 38 inches would put it up here, would it (indicating)?     A. Yes. [265—205]

Q. 58 inches from where?

A. From the bottom of the joist.

Q. From the bottom of this joist?     A. Yes.

Q. Down to this plank?

A. Down to the beam of the counter-weight.

Q. Down to the beam of the counter-weight?

A. Yes.

Q. That is 58 inches?     A. Yes, sir.

Q. The counter-weight goes down about how far to the sill—how far from the sill?

A. There is not any sill there.

Q. There was a sill there?

(Testimony of Charles S. Lundgren.)

A. There is some planks there.

Q. And how far does it go from that plank?

A. Probably an inch or two.

Q. Was that plank there when Louis Godo got hurt?     A. I do not know. I suppose it was.

Q. Then the plank was in the same position when Louis Godo got hurt, was it?     A. I think so.

Mr. FLETCHER.—That is not cross-examination.

Mr. EVANS.—We move to strike out all that as not proper cross-examination.

Mr. FLETCHER.—This witness was asked nothing about Godo and the plank.

The COURT.—Motion denied.

Mr. EVANS.—Exception.

The COURT.—Exception allowed. [266—206]

Q. Now, you say that it is 58 inches from the lower portion of the joists down to the bottom of the weight?     A. Yes, sir.

Q. Practically five feet?

A. Lacking two inches.

Q. And that the weight goes down within an inch or so of this plank?

A. An inch or two, something like that.

Q. And did you examine any other portions of the guide?

A. I could not tell anything about the guides at all.

Q. Could not?     A. No, sir.

Q. There was nothing there to indicate more wear than the present.     A. No, sir.



(Testimony of Charles S. Lundgren.)

(By Mr. EVANS.)

Q. The appearance of the guides at the bottom is the same as the rest of it, isn't it, it is worn?

A. Practically, it is worn now and covered with grease.

Q. Now, how did you make these measurements you testified about, by running the counter-weight up? A. Yes, sir.

Q. And the elevator clear down?

A. Yes, sir; run the elevator clear down.

Mr. EVANS.—That is all.

(Witness excused.) [267—207]

**[Testimony of Joseph McMillen, for Defendant.]**

JOSEPH McMILLEN, a witness called for and on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination.

(By Mr. EVANS.)

Q. State your name. A. Joseph McMillen.

Q. Where do you live?

A. 3598 East L street, Tacoma.

Q. What is your occupation?

A. My main occupation is ship-building.

Q. Ship carpenter, you mean?

A. Ship carpenter.

Q. Where are you employed?

A. At the Carstens Packing Company.

Q. How long have you worked there?

A. A little over two years.

Q. Who is the foreman there of the carpenters?

(Testimony of Joseph McMillen.)

A. Mr. Lundgren.

Q. Did you assist him in making some measurements in reference to the height of the counter-weight on which the elevator travelled?

A. Yes, sir.

Q. Did the track indicate where it had run before?

A. As near as we could find out, yes.

Q. Did you make any measurements about the difference between where it runs now and where it run before at the top of the shaft?

A. Yes, sir.

Q. What was that difference? [268—208]

A. Well, to tell it my way is that the counter-weight goes 58 inches below the joist now.

Q. Below the joist now?

A. Yes, sir.

Q. What is this?

A. That is the counter-weight, I should judge.

Q. Can you take that and illustrate to the jury where the counter-weight runs to at the top now as compared to where it ran to before?

A. I think I can.

Q. I wish you would do it?

A. According to the way we figured it and measured it—

Q. Where does it run to now?

A. The counter-weight when the elevator is up is down there—(indicating the bottom of the shaft) it used to run there, that is, I call that three feet and two inches to where it runs now.

Q. Does this cross indicate where you figure it ran to?

A. Yes.

Q. Does the mark EF at the bottom of this up-

(Testimony of Joseph McMillen.)

right?      A. Yes, sir.

Q. Now, where does the counter-weight run at the present time at the top?

A. It runs an equal distance from here to here less —(illustrating).

Q. Illustrate on there where it runs to at this time.

A. It runs to here (illustrating).

Q. That is the place here where I have a mark.

A. We are taking our measurement from the bottom, to the bottom. [269—209]

Q. It runs from A to B?      A. Yes, sir.

Q. Where does the wear on the track indicate it ran to before?      A. It used to run from here.

Q. That is from EF?      A. Yes, sir, to there.

Q. To the line marked CD?      A. Yes, sir.

Cross-examination.

(By Mr. TEATS.)

Q. Did you mean to say that the weight went clear to the top of the guides before?

A. No, it did not go clear to the top of the guides.

Q. How far from the top of the guides?

A. We did not measure that. We simply found the mark showing as high as the weight had travelled, as near as we could find it from the wear and grease.

Q. There is not much there to indicate it positive, is there?

A. According to measurement it proves itself.

Q. I see, if you guess at the measurement here?

A. Yes, sir.

Q. Have you guessed at the measurement here (in-

(Testimony of Joseph McMillen.)

dicating)?     A. No, we measured that.

Q. If you measured 58 inches here, of course you can go up there and make the same measurement there and guess where it went to?

A. We found as near as we could before we made any measurements.

Q. The difference it ran up in the guide there was a mere [270—210] matter of guesswork?

A. Well, as far as that is concerned it was where we could see as far as it had worn.

Q. And that might have worn some other time, you don't know when that was worn?

A. Might have worn before I was there.

Q. And it was not very much worn, was it?

A. No, naturally would not be.

Q. It was not much worn between these two sides here?     A. No.

Q. Compared to what it was down below?

A. No, the upper end where it stops has less wear than it has in the travelled part.

Q. Thirty-eight inches here is not worn so much as compared below with 38 inches?     A. No.

Q. There was not any wear down below here, below this place?

A. Not so much as there is through the middle.

Q. All the way up and down there the wear is about the same?     A. Just about the same.

Q. Just about the same.

(By Mr. FLETCHER.)

Q. Mr. McMillen, was the upper part of this track painted or whitewashed or anything so that the wear

(Testimony of Joseph McMillen.)

would be observable?     A. No, sir.

Q. This part was not whitewashed?

A. No, sir, just the natural color of the wood, only for the grease. [271—211]

Q. How was it around the outside?

A. It has just the natural wood.

(By Mr. TEATS.)

Q. Then all you could go by would be the natural wood and natural wear and tear there?     A. Yes.

Q. No paint and no whitewash to indicate anything?

Mr. TEATS.—He says no. You say no to that answer, do you?     A. I say no.

(Witness excused.) [272—212]

**[Testimony of Peter Cornils, for Defendant.]**

PETER CORNILS, being recalled, continues his testimony as follows:

Direct Examination.

(By Mr. EVANS.)

Q. Were you the master mechanic there at the time the elevator was installed?     A. Yes, sir.

Q. Are you familiar with it from the time it was installed down to the time the cable broke and the counter-weight was refastened to it?     A. Yes, sir.

Q. Had that cable ever broken from the time it was installed until it broke at the time in question?

A. No, sir.

Q. Had the cable ever been changed up to that time from its original construction?     A. No, sir.



(Testimony of Peter Cornils.)

Cross-examination.

(By Mr. TEATS.)

Q. How do you know?      A. How do I know?

Q. Yes.      A. There was no occasion for a change.

Q. How do you know?

A. I know there had not been any occasion for a change.

Q. Have you looked over your time-book to see whether there was any change or not?

A. It could not be changed; there was no occasion.

Q. Have you looked over your time-book? [273  
—213]

A. It was not necessary to have it in the time-book because there was no break occurred.

Q. The only way you can tell anything over there is by the time-book, isn't it?

A. No, sir, I can remember too.

(Witness excused.)

Mr. EVANS.—We wish to offer the model for illustration before the jury.

The COURT.—It will be admitted.

Thereupon the said model is received in evidence by the Court and marked as Defendant's Exhibit 12.

Defendant rests. [274—214]

**Rebuttal.**

**[Testimony of Louis Godo, in His Own Behalf  
(Recalled).]**

LOUIS GODO, being recalled in rebuttal, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. You heard yesterday what Pete Cornils said

(Testimony of Louis Godo.)

about getting the peevy?      A. Yes, sir.

Q. Did he ever tell you anything about getting the peevy?

A. That is the first time I heard of the peevy, was yesterday.

Mr. FLETCHER.—I object to this as not rebuttal. It is part of their case in chief. He is prepared, I take it, to tell what took place, and that was what he had to do in his case in chief, and now we have contradicted that. He has testified I think that he wanted to get some instrument or peevy or something, and Pete would not let him.

Mr. TEATS.—No, he did not say anything about that. He said he wanted to take up the plank.

The COURT.—Objection overruled. This goes to the direct contradiction of the defendant's witnesses. Exception allowed.

Mr. TEATS.—That is all.

Mr. EVANS.—That is all.

(Witness excused.) [275—215]

**[Testimony of Mr. Carroll, for Plaintiff (Recalled).]**

Mr. CARROLL, being recalled by the plaintiff in rebuttal, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. Mr. Carroll, while you were there with Godo, after taking him from the building and up to the time of taking him away in the carriage, did you hear Pete Cornils ask him, Mr. Godo, in substance, "Why didn't you take up the plank?" or "Why did you go

(Testimony of Mr. Carroll.)

under the building''?     A. No, sir, I did not.

Q. Were you there all the time?

A. I was within 15 or 20 feet of him most of the time, yes, sir.

Cross-examination.

(By Mr. EVANS.)

Q. How many people were around there at that time?     A. Well, now, I could not say.

Q. Quite a bunch gathered?

A. There was I should judge six or eight, maybe ten, maybe more.

Q. Everybody talking more or less?

A. Well, yes.

(Witness excused.)     [276—216]

**[Testimony of H. E. Hanson, for Plaintiff  
(Recalled).]**

H. E. HANSON, being recalled on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. After taking Mr. Godo out from under the building did you hear Mr. Cornils say to Godo, why didn't you take up the plank, or why did you go under?

A. He never so far as I was there, he never said a word of that kind.

(By Mr. EVANS.)

Q. How many people were there?

A. Oh, quite a few.

Q. Everybody talking some?

A. Few of them. When we got him out first there

(Testimony of H. E. Hanson.)

was only a few but they came right along after that.

(Witness excused.)

Plaintiff rests. [277—217]

### Medical Testimony.

[Testimony of Dr. E. M. Brown, for Plaintiff.]

Dr. E. M. BROWN, a witness called for and on behalf of the plaintiff, being duly sworn, testified as follows:

#### Direct Examination.

(By Mr. TEATS.)

Q. Your name is E. M. Brown? A. Yes, sir.

Q. You are a regular practicing physician and surgeon under the laws of the State of Washington?

A. Yes, sir.

Q. And have been for several years last past?

A. Yes, I have.

Q. Are you acquainted with Mr. Godo, the plaintiff in this case?

A. Yes, sir, I have known him since the first few days in March.

Q. What year? A. Of this year.

Q. Describe to the jury the conditions he was in when he first came to you, and all about it.

Mr. EVANS.—That is objected to for the reason that it is after the time of the accident and too remote.

The COURT.—You will endeavor to trace the medical testimony and the treatment from the time of the injury up to the time Dr. Brown saw him?

Mr. TEATS.—We are going to have other doctors.

Mr. EVANS.—I would rather have it put in in the

(Testimony of Dr. E. M. Brown.)

proper way, and have this witness come up later.  
[278—218]

Mr. TEATS.—The doctor expects to leave town.

The COURT.—On account of the witness leaving— When do you expect to leave, Doctor?

The WITNESS.—I am supposed to be in court in Chehalis to-morrow.

The COURT.—I think the explanation is sufficient to put it in out of order.

Mr. EVANS.—Exception.

The COURT.—Exception allowed.

Mr. EVANS.—I understand the history of the case will have to be shown up to the time of the condition that this doctor testifies about, or this will not be admissible and it will be stricken.

Mr. TEATS.—I do not suppose we have got to have any other doctors here. We have described the injuries. The plaintiff has described everything that has been done, and now the doctor will go on and testify to what the conditions were from March on. We are not compelled to put any other doctors on the stand if we don't want to. We are going to, but we don't want this testimony to be upon any condition at all. We might put on the company doctor or we might not, we are not compelled to, but we will put on some other doctors.

Mr. EVANS.—I desire to object to the evidence on the further ground that the witness was in the courtroom while the plaintiff was testifying, in violation of the rule which was invoked at the request of counsel for the plaintiff.



(Testimony of Dr. E. M. Brown.)

The COURT.—The motion denied and motion overruled. This witness was not here when the order was made, and has been in the courtroom only a short time. [279—219]

Mr. EVANS.—Note an exception.

The COURT.—Exception allowed. I will say that in other cases it has been customary to waive the rule so far as the medical testimony was concerned.

Mr. EVANS.—If that is the custom I will waive it in this case as to the physician.

(Question repeated.)

A. His left foot was swollen, being an inch and over larger in circumference than the right foot. The foot was rigid so that I could make very little motion in any direction, either extending it or drawing it up or from one side to the other. The foot was bluish and cold to the touch. The circulation was imperfect in that respect so that the foot was a different color and cold to the hand. The back in the seat of the accident had lost its natural curvature. He stood with his back in a straight immovable condition, and the muscles on each side of the bone—right in the center of the back is a hollow between the side muscles. Those muscles were rigid and hard so that they stood out and were not yielding like a normal muscle. When I would push on them or press on them they were rigid. The motion of the back, sideways, turning around or bending forward, were limited. If he wanted to turn around he would turn his whole body, and he was especially tender on

(Testimony of Dr. E. M. Brown.)

the back at what is known as the lumbar region, just about where you speak of as the small of the back, and where the pelvic bone joins the back it was more tender on one side than the other. On the sides pressure elicited symptoms of pain, [280—220] causing a quickening of the heart action, rapid pulse, and flinching and contracting of the muscles, indicating pain, and on the left side, somewhere in the region of where I have my hand, I do not remember exactly, there was a hard cartilaginous lump which was immovable. Not movable to any great extent, but it was not fixed solid to the bone, but I could move it about a little. That I would state has disappeared. I am not able to find it now. He complained of pain being greater on the left side at that time than on the right, but on the right side I found what I thought was a fractured condition about the 7th or 8th ribs, but there was no deformity, anything indicating any deformity of the bones, but there was a thickening at that place; might have been callous or it might have been a swollen condition of the covering of the ribs, so that when I pressed along the right side I could feel a lumpy feeling.

At the present time he complains— (Interrupted.)

Mr. EVANS.—We object to what the gentleman complains of. Let him testify what conditions he found.

The WITNESS.—At the present time there is apparent pain. Slight pressing there causes the drawing away and flinching and symptoms of pain. The

(Testimony of Dr. E. M. Brown.)

left side is not painful like it was on the start. The apparent pain was greater on the left side when he started, but it is not now, but on the right side we find indications of pain and drawing away from pressure. On the breast bone there were two points that seemed to be abnormal, about where the second rib joins the breast bone there was a swollen [281—221] condition of the bone or cover of the bone. Running my finger up and down there was callus or thickening of the tissues covering the bone, and also the tip of the breast-bone was drawn in and was abnormally moved. That last condition now, if any different, allows the bone to stand out more than it did then. That is the lower end of the bone seems to be thrown in abnormally greater than it was normally. I will state I use the word “seems” because there are no two persons that will be exactly alike at the lower end of the breast-bone, but in the early days when I was treating him, that seemed to be drawn in while now it is not drawn in and there is a lump about two inches from the lower end. The upper lump has practically disappeared. He still holds his body in a rigid condition, and I get the symptoms of pain in causing movements of the body or pressure at the points that I would expect on the left side. That is a great deal less than it was. The foot at the present time is not swollen like it was. It has lost its hard feeling. Before it felt like it was filled with cement, cement-like feeling, and now it has lost that feeling and has more the appearance of a flat foot than it did when I first saw it, that is the

(Testimony of Dr. E. M. Brown.)

arch has settled down more than it was and is inclined to dip in. The inner angle sags down nearer the floor or ground than it did, and one side of the foot at the arch is lower than it was when I first commenced to see him. The motions of the foot are better than they were, but he has not the full motions like the other foot.

Q. Have you been treating him since March?  
[282—222]

A. Yes, sir, I have been treating him.

Q. What would you say as to his back, his comparative condition of his back, that is relatively, compared with the time you first saw him in March and for instance yesterday when you saw him?

A. Well, his back is not any better. He is inclined to be bent more forward than he was, more of a settled down condition. I forgot to state first that the muscles over the abdomen have always been and still are rigid, and in pressing over the abdomen he has symptoms of pain so that the muscles are at all times rigid, cannot get him to relax his muscles, and they seemed to be drawing the chest rather down and forward and give him more that leaning forward condition.

Q. What would produce that condition, Doctor?

A. An injury to the internal viscera, or spraining of the diaphragm or general injury of the viscera, that is the stomach and intestines, by being injured or disease allowed to drop down and being tender, causing the rigidity of the muscles to protect those organs; and it could also be done by a direct injury



(Testimony of Dr. E. M. Brown.)

or sprain to the abdominal muscles.

Q. For instance, Doctor, a man, the plaintiff in this case, was in a space about 26 inches, and while in a stooping position a weight of 16 or 17 hundred pounds, being the counter-weight of an elevator, came down and struck him upon the shoulder and crushed him into the mud beneath, the weight you see in Exhibit 4—this counter-weight, came down and struck him just below the shoulder and below the clavicle— [283—223]

The COURT.—You have that word wrong, haven't you Mr. Teats? It is scapula and not clavicle.

Mr. EVANS.—He pleaded clavicle in his complaint, and I was anxious to find out how it could be.

Mr. TEATS.—Scapula, if the Court please.

Q. Now, what would you say as to the condition you found him in, as to having been produced by that accident?

A. Such injuries could be produced by that, that is injury to the body and chest.

Q. And to the foot?

A. Well, that could be produced in connection with it, anything to throw the weight of the body or a strain or pulling in putting his foot in any unnatural position, great pressure against it would cause strain or breaking of ligaments and joints in the foot.

Q. Where was the injury in the foot?

A. It seemed to be the whole instep. There is a density between all the bones, that is, you cannot get any motion. There is a positive limitation of motion between the seven bones of the foot where they



(Testimony of Dr. E. M. Brown.)

articulate with each other. They are all rigid and bound together and they still are in that condition, and so far as the injury to the foot is concerned, it was a severe straining of the attachment of one of these bones to the other, possibly a fracture of some bone, but I have never diagnosed a fracture, so that I will say it is a general injury to several articulations and attachments of the ligaments and tendons in that region.

Q. What would you say as to the condition of the foot being permanent or otherwise? [284—224]

A. I consider the injury is permanent, that is, he will have a flat foot and weakened foot. It will probably improve though.

Q. What would you say as to the back?

A. That will probably improve. I think, though, with the condition it has been in all these months I have been treating it—these nine months, it will be a long time, be perhaps a couple of years yet, before he will be positively free from the pain, but I think there will always be a weakened condition of the back.

Q. What would you say as to his being able to work as a carpenter around buildings and so on?

A. At the present time?

Q. No, in the future.

A. Well, it would be limited. The injury to the foot would make the work more dangerous to him and would interfere with his work, and the lack of flexibility of the back would impair him for anything but selected work.

(Testimony of Dr. E. M. Brown.)

Cross-examination.

(By Mr. EVANS.)

Q. In the course of a couple of years you think he will be practically all right then, Doctor?

A. I think he will probably be better. I cannot tell, but he will probably be better.

Q. You think he will be practically all right at the end of two years?

A. No, I do not think he will be all right, because the man's condition has not improved to any great extent—

Q. I just want to find out— [285—225]

A. (Continuing.)—in the year, so that I do not think he will be all right in two years.

Q. In how many cases of this nature have you been the attending physician for the plaintiff wherein Mr. Teats was the attorney for the plaintiff?

A. I could not tell you how many. I could probably find out but I could not tell you.

Q. A good many hundred?

A. No, not in the hundreds.

Q. Not in the hundreds? A. Oh, no.

Q. You have been Mr. Teat's medical witness in damage cases for the past ten years, haven't you?

A. I have often been a witness for him during the last period of years; I do not remember the number, perhaps ten, maybe 12.

Q. In this case, did you see him before you saw the patient? A. How is that?

Q. Did you see him before you saw the patient in this case? A. Mr. Teats?

(Testimony of Dr. E. M. Brown.)

Q. Yes?      A. No, sir.

Q. Did the patient *told* you that Mr. Teats sent him to you?

A. He did yesterday or the day before.

Q. Were you advised at the time he came to you that there was a damage suit pending?

A. I do not remember whether he told me anything about it or not. I know that the man himself told me that there would be a case of litigation, but I do not remember. Of course, coming the way he did, I presume that I thought [286—226] it would be, but I am not certain about it.

Q. I think that is all.

Redirect Examination.

(By Mr. TEATS.)

Q. You have also appeared in court for Ellis & Fletcher, haven't you?      A. Yes, sir.

Q. And Mr. Evans?      A. Yes, sir.

Q. And when they have cases for the plaintiff they ask for your assistance too?      A. Yes, sir.

Q. And your expert knowledge?      A. Yes, sir.

Recross-examination.

(By Mr. EVANS.)

Q. When did you appear for me?

A. Ellis & Fletcher?

Q. I am talking about Fletcher & Evans.

A. I do not know which one it was. The firm I suppose. I remember one of them, I went down in the Grays Harbor country I know.

Q. There was one case for the firm of Ellis &

(Testimony of Dr. E. M. Brown.)

Fletcher several years ago, was there not?

A. How is that?

Q. There was one case for the firm of Ellis & Fletcher a good many years ago, was there not?

A. I think so, I am not certain. [287—227]

Q. And that is all, wasn't it?

A. No, the firm, they have consulted me about other cases, whether or not it has been in court, whether they have gone into court or not I do not know, because the majority of the attorneys that consult me about cases, the cases do not get to court, in the majority of them.

Q. But you have been a witness for Mr. Teats frequently, a professional witness for a good many years? A. Yes, sir.

Q. And you will average once or twice a month on the witness-stand in that time, wouldn't you, sometimes a good deal oftener?

A. On some months, yes, sir; I have two in a day sometimes.

Q. There are different causes of swelling in the human body, are there not? A. Yes, sir.

Mr. TEATS.—Q. From what you saw would you say that that was from the accident and the injury he received?

A. From traumatism, an injury to the foot, this condition was.

Mr. EVANS.—Q. Might be from a dropsical condition or something else?

A. Not this thickening.

(Testimony of Dr. E. M. Brown.)

(By Mr. TEATS.)

Q. The swelling might be from some disease?

A. It might be from inflammation of the bones, but could not have been from dropsy.

Q. It could have been from some disease?

A. Yes, it could have been from osteitis or something like that, but it was not. [288—228]

(By Mr. EVANS.)

Q. You are positive of that?

A. Yes, I am positive.

Q. That is all.

(Witness excused.) [289—229]

**[Testimony of Dr. John Reitz, for Plaintiff.]**

Dr. JOHN REITZ, a witness called and sworn on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. What is your name?      A. John Reitz.

Q. Are you a regular practicing surgeon and physician under the laws of the State of Washington?

A. Yes, I am.

Q. And were you a year ago?      A. Yes, sir.

Q. You are a graduate of—

A. I am a graduate of the German University of Munich.

Q. Of the medical department?

A. Yes, sir, and admitted by the State examination in Spokane two years ago.

Q. When did you first see Mr. Godo, the plaintiff sitting here?



(Testimony of Dr. John Reitz.)

A. I saw first Mr. Godo on the 8th day of August last year.

Q. 1911?

A. 1911, yes, and he was under my treatment until the 20th of October of the same year.

Q. You met him at your office?

A. Yes, sir, I met him the first thing in my office.

Q. Did you examine him then?

A. I examined him in my office, yes.

Q. And for what did you examine him?

A. He was complaining about inability to walk, it hurts so awful much when he is trying to walk, and sleep, and [290—230] he told me he was hurt some time in going under an elevator, and since that time would not be able any more to do anything to walk and get around, and I examined him for this.

Q. What did you find as to his foot?

A. I found swelling of the left ankle, below the left ankle, around the left foot. This kind of swelling was pretty clear. I compared this with the other side, and there was some very clear difference in the size. By touching it it was very painful, and he could not move his foot up and down in the front direction. I found it was a stiffening of the ligament. The bones were all right; there was nothing broken, but I think the matter was not with the bony part of the leg, but the ligaments were not in order.

Just in the place where the ligament should be there was a swollen place, and this awful hard pain by touch. In this way I found out the twisting of the ligaments of the left foot below the ankle. There

(Testimony of Dr. John Reitz.)

was bruises of the 8th and 12th ribs near the sternum line—that is this line here (indicating breast-bone), there was very clear bruising and swelling, too, and same kind of bruises was on the back side and lumbar part of the spine. That was the condition which I found by examination.

Q. How long did you treat him, doctor?

A. I treated him until the 20th of October.

Q. From August until the 20th of October?

A. Yes.

Q. Then did he come to you any more? [291—231]

A. No, he did not come up any more to my office. He got a little better, and after while did not call any more in my office.

Q. What would you say would be the cause of the conditions you found?

A. What are the causes of this condition?

Q. Yes.

A. He told me about his accident to the elevator—  
(Objected to.)

Q. What would you say, sudden pressure or what?

A. I would call it a sudden, yes. I would call it pressure on this part of the body where these bruises were.

Q. Then say, for instance, Doctor, in May, the latter part of May, previous to the time he came to see you, Mr. Godo was about this position (illustrating), and while in this position a heavy weight of some seventeen or eighteen hundred pounds came down upon him striking him across the shoulder blades, and

(Testimony of Dr. John Reitz.)

crushing him down into the mud so that his face stuck in the mud. Would you say that weight and that pressure would cause the condition that you found in his body?

A. Yes, that would be able to cause this condition, certainly.

Q. That is all.

Mr. EVANS.—That is all.

(Witness excused.)

The COURT.—Is your other doctor here, Mr. Teats?

Mr. TEATS.—The other doctor is not here yet. We expected to have Dr. Quevli. [292—232]

The COURT.—You may make your statement, Mr. Evans.

Mr. EVANS.—We would prefer to wait until counsel has closed his case.

The COURT.—I understand he has closed, except this particular doctor.

(Discussion.)

Mr. TEATS.—Well, we will close without Dr. Quevli. [293—233]

Thereupon, and after argument by counsel to the jury, the Court charged the jury as follows:

GENTLEMEN OF THE JURY:

It will now be your duty, after the instructions of the Court, to determine the issues between the plaintiff and the defendant in this case. You will take the pleadings out with you consisting of the complaint and supplemental complaint and answer and reply, and these pleadings will show you exactly

what the allegations are that the plaintiff makes, and exactly what denials the defendant makes, and what additional allegations the defendant makes.

But briefly the complaint of the plaintiff alleges that the defendant was negligent in not warning him of the hidden danger of which he had no knowledge, and he was injured on account of that negligence. The defendant denies that it was negligent, and alleges that it had no idea he was going where he did go when he got hurt, as his orders were to go somewhere else. The defendant alleges that he assumed the risk that resulted in his injury, and alleges that he contributed to the happening of the accident in which he was injured by his own negligence or want of ordinary care. This allegation of the assumption of risk on his part and of contributory negligence the plaintiff denies in his reply.

Under these pleadings the burden of proof is upon the plaintiff to establish the particular negligence which he alleges that the defendant was guilty of, and [294—234] on account of which negligence he was injured. That is, the plaintiff must prove by a fair preponderance of the evidence that the defendant was negligent in the particulars of which he complains in his complaint, and that his injury was the proximate result of that negligence on the defendant's part. The plaintiff must prove by a fair preponderance of the evidence every material allegation in his complaint, except those that may be admitted by the answer.

The pleadings are not in evidence in the case. No one has offered the pleadings as evidence in the case,

and it is the rule of law that they are not considered as evidence in the case, but the admissions in the answer regarding the allegations of facts made in the complaint may be considered, because the plaintiff does not have to prove what is admitted.

This case involves questions concerning negligence and involves questions concerning the law of master and servant.

The law defines negligence to be the want of ordinary care; that is, that degree of care which an ordinarily careful and prudent person would use under like circumstances, under the same circumstances, and should be proportioned to the peril and danger reasonably to be apprehended from the want of proper prudence. This rule applies alike to both parties to this action, and may be sued by you in determining whether either or both of them have been negligent.

The plaintiff in this action is what is known in law as an employee or servant, and the defendant in [295—235] this case is what is known as an employer or master, and in these instructions when the words “master” and “servant” are used, or employer or employee are used, you will understand that they are used as applying to that relation that existed between the plaintiff and the defendant at the time that this injury occurred.

The master is under a positive duty, owes the positive duty to his employee, to provide the employee with a reasonably safe place in which to do his work. This duty being one that is positively imposed upon the master in the first instance, he will not be excused



from its performance by entrusting it to another charged with the duty to make performance for him, but who neglects to perform that duty, but the master is not an insurer of the lives and limbs of his employees. The master is not liable unless he has been guilty of some act of negligence resulting in an injury to the servant, and which has not been contributed to in any way by the servant's own negligence or want of ordinary care.

To enable the plaintiff to recover in this suit he must not have contributed in any way to the happening of the accident in question by his own negligence or want of ordinary care. Whether the defendant was negligent or whether the plaintiff was negligent are questions to be determined by you on consideration of all the facts in the case, the surroundings and situation at the time of the accident, tested by your judgment as practical men.

When a party comes into Court as has been done in this case, and alleges negligence on the part of another as a cause of action, he must, before he can [296—236] recover, establish that negligence by a fair preponderance of the evidence, and in this case if you find that the greater weight of evidence is with the defendant, or that it is evenly balanced so that you are unable to say on which side the preponderance is on that question, the plaintiff cannot recover and your verdict should be for the defendant. The defendant having come into court in its answer and alleged negligence on the part of the plaintiff, which it says contributed to the happening of the accident, the burden of proving that negligence is upon the

defendant, unless the plaintiff in his testimony has shown he was guilty of contributory negligence.

The Court in one of the first instructions given you told you that before the plaintiff can recover he must show by a fair preponderance of the evidence that the defendant's negligence was the proximate cause of his injury. Proximate cause the law defines to be the moving, efficient cause. The law says that a party is liable for all of those consequences that flow naturally and directly from his acts, and is not liable for those consequences that do not flow naturally and directly from his acts. The Court has several times in these instructions used the expression "Preponderance of the evidence." Preponderance of the evidence means the greater weight of evidence. In exact terms evidence does not weigh, but it means that evidence that appeals to your reason and understanding with the greater force, in the more convincing and persuasive manner, and creates in your mind belief in opposition to that which is brought against it. [297—237]

A servant who enters the service of the employer impliedly agrees to assume all of the risks and dangers that are ordinarily and naturally incident to the employment in which he is engaged. In this case if you believe that the injury to the plaintiff is only the result of a risk ordinarily incident to the employment in which he was engaged, and not otherwise, then he cannot recover, and your verdict should be for the defendant.

A servant, where he enters the service of the employer and remains in it, not only agrees to assume

the risks that ordinarily attach to that employment, but he agrees to assume the extraordinary risks and dangers which he knows and appreciates, or which he should know and appreciate in the exercise of ordinary care for his own safety.

The Court has instructed you that it is a duty of the master to provide the servant with a reasonably safe place in which to do the work he is employed to do. If, on account of changes in the construction of the master's premises and appliances, the servant's place of work ceases to be reasonably safe, and is made by the master unreasonably and unnecessarily dangerous, and the master knows of the danger or should in the exercise of ordinary care in the performance of his duty know of such dangers, and the servant did not know of the changed condition and did not appreciate the danger therefrom, and could not by the exercise of reasonable diligence know such dangers, the master should give the servant such warning of the hidden dangers so created as an [298—238] ordinarily careful person would give under all the circumstances to render the servant's place of work reasonably safe, and if such master negligently fails to give any warning, and such failure is the proximate cause of the servant's injury, the master is liable, unless the injury was contributed to by the servant's own negligence or want of ordinary care. If the changes made and the dangers arising therefrom are open and obvious and observable by one of the age, intelligence and experience of the servant in the exercise of ordinary care for his own safety, the master would be under no duty to

warn the servant, and would not be negligent in failing to warn the servant.

If you should find from the evidence that the plaintiff was instructed to make the measurements from under the wharf or building, then you are instructed that he could proceed, unless otherwise directed by his employer or the representative of his employer, in the way and course that an ordinarily prudent and cautious person would proceed, having the opportunity for observing and the knowledge of the dangers of the place of the accident, that you find that the plaintiff had at the time of the accident, and if you find that he did proceed with his work as an ordinarily prudent and careful person would proceed under all the circumstances, then you are to find that the plaintiff was not guilty of contributory negligence.

I did not enter very fully into the issues as framed by the pleadings, not only because you take the pleadings out with you and are expected to refer to them in determining what the questions are between these parties, [299—239] but because of a summary of the issues is contained in one of the written instructions.

In this case the plaintiff seeks to recover damages against the defendant. Plaintiff claims that defendant failed to perform its duty to him on account of which he received an injury.

He bases his right to a recovery on the ground that the defendant had allowed the counter-weight to the elevator formerly to stop at the floor of the building, but that some time before the day of his injury a new



cable was attached to the counter-weight which allowed the counter-weight to pass below the floor of the building down to about five inches of the ground. That from the floor of the building to the ground was a space of about four feet in height; that the workmen in defendant's employ were in the habit and in the performance of their work were required to pass under this counter-weight; that he did not know of the change in regard to the counter-weight coming down near the ground.

That on May 27th, 1911, it was necessary for him to go under the building in order to get under the wharf to make measurements for a vat. That Mr. Cornils was his boss and knew of the danger in passing under the counter-weight and knew of the change in the operation of the counter-weight but did not warn him, but on the contrary ordered and instructed him to go under the building and thence under the wharf to make the measurements, and that he in obedience to such order went under the building, and as he was passing under the counter-weight it came down and caught him, producing his injury. [300—240]

There is no evidence that the elevator or the counter-weight were in themselves defective or improperly operated, or that it was wrong in itself to have the counter-weight come down to the ground. The charge is that it did not formerly come below the floor, and that some time before plaintiff's injury it was changed and allowed to do so. That under the counter-weight was a passageway for the workmen, and that at the time of his injury he was specifically



ordered by his boss, whom he claims knew of the change in the operation of the counter-weight, to go under the building without telling him of this change, and that in the performance of his duties he went under the counter-weight in ignorance of the change and was hurt.

The defendant has answered, and for its defense states that the counter-weight operated through tongued uprights which extended all the way to the ground and up through the building. That this building is built over the tide-flats and about three feet above the wharf; that the wharf is about four feet above the ground and extends just under the building, leaving an open space of about seven feet from the ground to the floor of the building. That the space between which the counter-weight operates is about four feet wide, and is near the side of the building. That on each side of it is a small space about fourteen inches wide. That all the rest of the space under the building is open and safe for one to walk about, and about seven feet high above the ground. That prior to about the twenty-first day of January, 1911, the cable on the counter-weight allowed the counter-weight [301—241] to come to about four feet below the floor of the building, or about three feet from the ground. That about that time the cable broke near the counter-weight; that a wind of the cable was taken from around the drum and reattached to the counter-weight which lengthened the cable about three feet, so that from that time the counter-weight came down, when the elevator went to the top, to almost the ground. That this

was the condition at all times from then until plaintiff was injured.

Defendant further claims that plaintiff is an experienced carpenter and had been in its employ for many years, and helped build the wharf in question. That the side of the building where the vat was to be placed extends all the way down to the mudsill and there was no way to get under this part of the wharf by going under the building. That for some days before plaintiff's injury, he had worked under the building near the counter-weight, and knew where it was located, and how it operated and knew that all the space under the building except where the counter-weight came down, and the two small spaces on each side, was open so that one could go in safety wherever he pleased under the building, except under the counter-weight.

Before the day of plaintiff's injury he had finished his work under the building and there was no occasion or duty requiring him to then go under the building. That on the day in question defendant wanted a vat let into the wharf just outside of and adjoining the building, and wanted the space measured for a vat, and Mr. Cornils directed the plaintiff to make these measurements and took him [302—242] to the place outside of the building where the measurements were to be made, and directed him to tear up the plank in the wharf in order to find the supporting timber to which the measurement was to be made. That plaintiff had no duty or occasion to then go under the building, and that the defendant or its employees did not know that plaintiff intended

to go under the building, and without defendant's knowledge or the knowledge of its employees, the plaintiff for some reason of his own, went under the building and received an injury in some manner unknown to the defendant.

That on each side of the counter-weight is an open space of seven feet high and fifteen inches wide; that other than this space and the counter-weight space the entire under part of the building is open and safe for walking about in and about seven feet high from the ground. That the building is about three feet above the wharf, and the wharf extends just under the side and end of the building, leaving the space under the building with light sufficient for anyone to see and observe the conditions under the building, and to see and observe the counter-weight space, and the other spaces, and that if plaintiff was injured by the counter-weight coming down upon him it was, for these reasons, his own and not the defendant's fault.

The defendant also claims that the conditions and surroundings under the building and the space in which the counter-weight operated were all open and observable and were the usual and customary conditions, construction and operation; that there were no hidden dangers; that [303—243] plaintiff knew, or by the use of his eyes and faculties could have known of the conditions and the operations of the counter-weight and of the dangers of passing under the counter-weight, and that these open and apparent conditions and operations and dangers were assumed by the plaintiff when he entered defendant's employ and for that reason he cannot hold

the defendant responsible for his injury.

If an employee gets injured while doing something his duty does not require him to do, and he has no order to do, and the same is not done in the performance of his required employment, he has no right to hold his employer responsible for his injury, and if in this case the plaintiff had no occasion to go under the building and was not directed to go under the building and his employment at that time did not require him to go under the building, then he cannot recover in this action and your verdict must be for the defendant.

The law is, in other words, that where a servant in the discharge of his duty in the line of his employment voluntarily goes in a place that he is not required to go, he assumes the risk that attaches to that place.

If you find that the construction under the building and the operations of the counter-weight were the usual constructions and operations, and the same were all open and obvious, then though the plaintiff had some duty requiring him to go under the building, and those directing him did not warn him of the operations of the counter-weight, still if he knew the conditions and the operations of the counter-weight, or if the same were open and apparent [304—244] so that they were observable to an ordinarily careful person, then the plaintiff could not recover, for the law does not require an employer to warn an employee of conditions, operations or dangers when the same are known to the employee or can by ordinary use of his eyes and faculties be



observed by him.

If you find that the space under the building was open and afforded safe passage, except the space occupied by the counter-weight, and though you should find that the plaintiff's duty required him to go under the building, yet if you further find that for some reason of his own he went under the counter-weight knowing that it was above him, or that the same would have been known to him if he had made the use of his eyes that an ordinarily careful man would have made under such circumstances, and that the danger therefrom was or should have been appreciated by him, and instead of his using the open space under the building which afforded safe passage, he cannot hold the defendant responsible for his voluntarily using the unsafe way.

An employer, when he has in his employ a man of experience and of mature judgment, does not have to warn or instruct such employee about the usual operations of a factory, or open and ordinary dangers attendant upon such operations, when the same are open and obvious to such employee. For it is presumed that an employee of experience and mature judgment will observe these things for himself, and as a matter of law in doing his work he is held to assume these ordinary and usual risks and dangers, and if he receives an injury from operations that are usual, [305—245] customary, open and obvious, he cannot complain. If in this case the operations of the counter-weight were usual and customary in work of this kind, and open and obvious, and the danger therefrom was open and ob-



vious, and no duty required plaintiff to place himself in a place of danger under the counter-weight, and if the way under the counter-weight was not a used way and the entire balance of the space under the building was open and safe and plaintiff knew of these conditions, or by the exercise of his faculties should have known them, he cannot recover in this action and your verdict will be for the defendant.

If you find that a vat was to be let down into the wharf outside of the building, and the measurements were to be made outside of the building, and that Mr. Cornils took plaintiff to the place outside of the building and showed the plaintiff where to make the measurements, and directed him to tear up a plank in the wharf to find the supporting timber from which to make the measurements, and gave him no order to go under the building, and did not know that he would attempt to make the measurements by going under the wharf from under the building, and that plaintiff, notwithstanding these directions from Mr. Cornils, if you believe he so directed the plaintiff, of his own volition went under the building because he believed he could more easily make his measurements in that way, then by the plaintiff's failure to follow the directions of Mr. Cornils and assuming to do the work in his own way, his injury would be the result of his own fault [306—246] and the defendant would not be responsible therefor, and your verdict should be for the defendant.

The Court instructs you that before the plaintiff

is entitled to recover in this action he must prove all the material allegations of his complaint by a fair preponderance of the evidence. By preponderance of evidence is meant by the greater weight of the evidence; that is, the evidence most convincing to your minds, and in determining upon which side of the case the evidence preponderates, you should take into consideration all the facts and circumstances testified to on the trial, the apparent fairness or lack of fairness of any witness, the interest or lack of interest of any witness, and the apparent fairness or candor with which the witnesses testified, their demeanor on the witness-stand and all the facts and circumstances surrounding the trial, and from all the evidence and the facts and circumstances you are to determine upon which side the evidence preponderates. If the plaintiff fails to prove his case by a fair preponderance of the evidence, then your verdict should be for the defendant.

You are instructed that for the plaintiff to recover it is necessary for you to find that the evidence preponderates in favor of the plaintiff that his injury was caused by defendant's negligence as plaintiff has alleged it. By preponderance of evidence is meant such evidence as is more convincing to your minds, and in this case if, after hearing all the evidence, your mind is not more convinced in favor of plaintiff that his injury was caused by defendant's [307—247] negligence as he alleges it, that is, if your mind is left evenly balanced as to whose contention is right, then plaintiff would not

be entitled to recover and your verdict should be for the defendant.

You are instructed that in this case if you believe from the evidence that the plaintiff was an experienced man in the line of work in which he was engaged on the day of his alleged injury, and was familiar with the risks and dangers incident to such work, if any such existed, and if you further find from the evidence that the injury to plaintiff occurred through the happening of an event ordinarily incident to such line of work, then the plaintiff assumed all the risk of such injury when he entered upon such employment and he cannot recover in this cause.

You are instructed that where a servant is guilty of negligence himself, or fails to exercise ordinary care and caution, and such negligence or such failure to exercise ordinary care and caution contributed to his injury to such an extent that the accident would not have occurred but for such negligence of the servant or failure to exercise ordinary care and caution, then the servant is guilty of contributory negligence and cannot recover.

You are instructed that if you believe from the evidence that the plaintiff in going about his work chose to go about it and chose to remain in such place as would subject him to injury, and that his acts were not those of an ordinarily careful and prudent person under the circumstances, and that this want of ordinary [308—248] care on his part contributed to his injury, then said plaintiff was guilty of contributory negligence and he is not en-

titled to recover in this case and your verdict should be for the defendant.

You are instructed that if you believe from the evidence in this case that there were two ways or methods of doing the work in question at the time plaintiff claims to have been injured, one of which methods was safe and the other dangerous, and both of them and the dangers of the one way were open and apparent to plaintiff, and that he voluntarily chose the dangerous way and was injured, then he is guilty of contributory negligence and cannot recover in this case.

In that instruction I stated to you "the dangers of the one were open and apparent." By that I mean the one way which he chose and in which he was injured.

You are instructed that the master does not owe any duty to a servant to warn him of dangers which are open and apparent, and as readily observable by the servant as by the master, and if in this case you should find from the evidence that the counter-weight and the uprights upon which it operates were in plain view, and its condition open and apparent, and the plaintiff by the exercise of his faculties and ordinary care could have avoided the injury from said counter-weight, then you are instructed to find a verdict for the defendant; and in connection with that instruction I instruct you that a servant in going about in the performance of his work has the right to assume that the master has discharged the duty that he owes him with ordinary care. [309—249]



In this case there has been evidence that the men who fixed the cable after it broke laid down planks on each side of the counter-weight space to stand on, and it is argued that this constituted an invitation to Godo to use that way at the time he was injured. In regard to this matter you are instructed that unless you find that the defendant or its officers, or those in charge of its business, knew that the planks had been so laid or from all the circumstances should have known it, then the defendant would not be charged with knowledge of this situation and would not be charged with having invited the plaintiff to use this way. And though you should find against the defendant on this point, yet if you should further find that the plaintiff thoughtlessly and carelessly and without taking the precautions that an ordinarily prudent person would take, placed himself in a known dangerous position or in a position that from the use of his eyes and faculties he should have known to be dangerous, and that if it was his carelessness and negligence and failure to act as an ordinarily prudent person would have acted that caused his injury, then he cannot recover.

If under the evidence and these instructions you find the issues in this case in favor of the plaintiff, it will then be your duty to fix upon the amount of damages that he shall recover in the case. He should only recover, if you find the issues in favor of the plaintiff, on account of those injuries that he has suffered as the direct result of the defendant's negligence. In fixing this amount you may take into consideration [310—250] his age, his earn-



ing capacity and the nature and character of the injuries, if any, that the evidence has shown you he has suffered. You may take into consideration the pain and suffering which the evidence shows that he has endured as a direct result of any injury caused by the defendant's negligence. Before you could allow him anything on account of the permanency of the injury or future suffering the evidence must have shown with reasonable certainty that his injuries or some of them were permanent, or with reasonable certainty that he would suffer in the future. You will award him then such an amount as in your sound discretion you consider will fairly compensate him for the injuries he has suffered and no more, uninfluenced either by sympathy or prejudice.

You are in this case, as in other cases of fact tried to the jury, the sole and exclusive judges of every question of fact in the case, and the weight of the evidence and credibility of the witnesses and in arriving at the facts, and in passing upon the weight of the evidence and the credibility of the witnesses, you will resort to all of the tests that your experience has taught you to be safe and reliable in arriving at the truth in human transactions. The law says you shall weigh and take into consideration certain things in this case; but does not undertake to enumerate them all. And as I instructed you in one of these written instructions you should consider the candor, apparent candor and demeanor of the witness in giving his testimony; whether the witness testified fairly and [311—251] openly

and freely and frankly as you would expect a witness to do who is trying to tell the exact truth, and no more and no less, or whether the witness is evasive, reluctant and hesitates and has to be repeatedly questioned to get him to tell what he knows; and also whether the witness may not be too swift and too free and answers before he is asked a question or answered more than he is asked. You will also take into consideration the situation in which each witness was as enabling him to see and know the things about which he undertakes to tell you. You will consider the testimony of each witness by itself, whether it is reasonable and probable, and whether it is contradicted by other testimony which you believe or whether it is corroborated by other testimony in the case. You will also take into consideration the interest any witness is shown to have in the case, either in the manner in which he gives his testimony or his relation to the case. The plaintiff having testified in his own behalf, you should apply to his testimony the same rule you would to that of other witnesses in the case, including his interest in the result of the case.

You will disregard any remarks of the Court on the weight of the evidence or comments on the evidence, if any have been made, as you are the sole and exclusive judges of every question of fact in the case, and you will disregard any comment or statement of counsel that is not supported by your recollection of the testimony. The case is to be tried on the testimony.

The Court will submit to you two forms of verdict,

[312—252] one finding for the defendant generally, and one finding for the plaintiff. In the latter there is a blank left for the amount at which you assess his damages in case you find for the plaintiff. When you have arrived at a verdict you will cause whichever one of these forms agree with that verdict to be signed by your foreman, and if for the plaintiff have that blank filled out with the amount which you assess as his damages, and apprise the bailiff of the fact you have agreed and return that verdict into court.

(Jury retire.) [313—253]

### **Exceptions.**

Mr. EVANS.—If the Court please, I want to call your attention to the addition you made to our request 15, that is, you instructed them that the employee in going to and in the performing of his work has the right to assume that the master has discharged the duty that he owes him, as being misleading when read in the light of the other instructions, in that it was not qualified by stating to him—by requiring the servant to use his faculties even in the presence of danger.

Mr. FLETCHER.—I want to add to that exception Mr. Evans has spoken of. That is, that the negligence complained of in his case is the failure to warn. By that instruction you say that the plaintiff can assume we have not failed to warn him. It seems to me it is confusing.

The COURT.—Your instruction was confusing by putting it on the same footing, when they are not that way. I qualified it to counteract that.

Mr. FLETCHER.—That exception your Honor will allow us.

I desire to except to the instruction given in substance as follows, that the master owes a positive duty to provide the employee with a reasonably safe place to do his work, on the ground there is no evidence or circumstances in the case to justify that instruction, and it is misleading and confusing to the jury.

We also desire to except to the Court's instruction [314—254] reading as follows:

“The Court has instructed you that it is a duty of the master to provide the servant with a reasonably safe place in which to do the work he is employed to do. If, on account of changes in the construction of the master's premises and appliances, the servant's place of work ceases to be reasonably safe, and is made by the master unreasonably and unnecessarily dangerous, and the master knows of the danger or should in the exercise of ordinary care in the performance of his duty know of such dangers, and the servant did not know of the changed condition and did not appreciate the danger therefrom, and could not by the exercise of reasonable diligence know such dangers, the master should give the servant such warning of the hidden dangers so created as an ordinarily careful person would give under all the circumstances to render the servant's place of work reasonably safe, and if such master negligently fails to give any warning, and such failure is the proximate cause of the servant's injury, the master is liable, unless the injury was contributed to by the servant's



own negligence or want of ordinary care. If the changes made and the dangers arising therefrom are open and obvious and observable by one of the age, intelligence and experience of the servant in the exercise of ordinary care for his own safety, the master would be under no duty to warn the servant, and would not be negligent in failing to warn the servant."

We also except to the Court giving the instruction asked by the plaintiff (Plaintiff's requested [315—255] Instruction Number 4), as modified by the Court, and reading as follows:

"If you find from the evidence that the plaintiff was instructed to make the measurements from under the wharf or building, then you are instructed that he could proceed, unless otherwise directed by his employer or the representative of his employer, in the way and course that an ordinarily prudent and cautious person would proceed, having the opportunity for observing and the knowledge of the dangers of the place of the accident, that you find that the plaintiff had at the time of the accident, and if you find that he did proceed with his work as an ordinarily prudent and careful person would proceed under all the circumstances, then you are to find that the plaintiff was not guilty of contributory negligence."

We desire to except to the Court's refusal to grant our first instruction, which was for a directed verdict, which instruction reads as follows:

"You are instructed to return a verdict in this cause in favor of the defendant."



The COURT.—Exception allowed.

Mr. TEATS.—I have no exception now. I suppose those that are refused, we can have our exceptions for those any time.

The COURT.—Yes, sir. [316—256]

**[Order Letting Bill of Exceptions.]**

United States of America,

Western District of Washington.

Now, on this 27th day of January, 1913, the above cause coming on for hearing on the application of the defendant to settle the Bill of Exceptions in said cause, defendant appearing by its attorneys Messrs. Fletcher & Evans, and the plaintiff appearing by his attorney Messrs. Teats, Metzler & Teats, and it appearing to the Court that the defendant's proposed Bill of Exceptions was duly served on the attorneys for the plaintiffs within the time provided by law, and that no amendments have been suggested thereto and that counsel for plaintiff have no amendments to propose, and that both parties consent to the signing and settling of the same, and that the time for settling said Bill of Exceptions has not expired; and it further appearing to the Court that said Bill of Exceptions contains all the material facts occurring in the trial of said cause, together with the exceptions thereto, and all the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said Bill of Exceptions and the Clerk of this Court is hereby ordered and instructed to attach the same thereto;

Thereupon, upon motion of Fletcher & Evans, attorneys for defendant, it is hereby

ORDERED that said proposed Bill of Exceptions be and the same is hereby settled as a true Bill of Exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this Court who presided at the trial of said cause, as a true, full and correct Bill of Exceptions, and the Clerk of this Court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,

Judge. [317]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

United States of America,

Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, in pursuance of the command of the Writ of Error within, herewith transmit a true copy of the record and all proceedings in the case of Louis Godo, plaintiff and defendant in error, vs. Carstens Packing Company, defendant and plaintiff in error, lately pending in the United States District Court for the Western District of Washington, Southern Division, as required by the stipulation of counsel filed in said cause, as the originals thereof appear on file in said court.

I further certify and transmit the original exhibits in this cause, as well as the original Writ of Error and original Citation herein.

And I do further certify that the cost of preparing and certifying said transcript amounted to the sum of \$127.50, which sum was paid to me by the attorneys for the plaintiff in error.

Attest my official signature and the seal of this Court, at Tacoma, in said District, this twenty-seventh day of February, A. D. 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy Clerk. [318]

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[Endorsed]: No. 2253. United States Circuit Court of Appeals for the Ninth Circuit. Carstens Packing Company, a Corporation, Plaintiff in Error, vs. Louis Godo, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Received March 7, 1913.

F. D. MONCKTON,

Clerk.

Filed March 13, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

*In the United States Circuit Court of Appeals, for  
the Ninth Judicial Circuit.*

CARSTENS PACKING COMPANY, a Corpora-  
tion,

Plaintiff in Error,

vs.

LOUIS GODO,

Defendant in Error.

**Writ of Error.**

The United States of America,  
Western District of Washington,—ss.

The President of the United States of America, to  
the Honorable Judges of the District Court of  
the United States for the Western District of  
Washington, Greeting:

Because in the record and proceedings, as also in  
the rendition of the judgment, of a plea which is  
in the said District Court, before you, or some of you,  
between Louis Godo, plaintiff, and Carstens Packing  
Company, a corporation, defendant, a manifest error  
hath happened, to the great damage of the said  
Carstens Packing Company, defendant, as by his  
complaint appears, we being willing that error, if  
any hath been, should be duly corrected, and full and  
speedy justice done to the parties aforesaid in this  
behalf, do command you, if judgment be therein  
given, that then under your seal, distinctly and  
openly, you send the record and proceedings afore-  
said, with all things concerning the same, to the  
United States Circuit Court of Appeals for the Ninth

Judicial Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, on the 22d day of March, A. D. 1913, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this twentieth day of February, A. D. 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy Clerk.

[Endorsed]: Original. In the District Court of the United States for the Western District of Washington, Tacoma. Writ of Error.

No. 2253. United States Circuit Court of Appeals for the Ninth Circuit. Received Mar. 7, 1913. F. D. Monckton, Clerk. Filed Mar. 13, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.



*In the United States Circuit Court of Appeals, for  
the Ninth Judicial Circuit.*

CARSTENS PACKING COMPANY, a Corpora-  
tion,

Plaintiff in Error,

vs.

LOUIS GODO,

Defendant in Error.

**Citation.**

United States of America,  
Western District of Washington,—ss.

To Louis Godo, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said circuit, on the 22d day of March, A. D. 1913, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, wherein Carstens Packing Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, this 20th day of February, A. D. 1913.

[Seal]

EDWARD E. CUSHMAN,  
United States District Judge for the Western Dis-  
trict of Washington.

[Endorsed]: In the District Court of the United States for the Western District of Washington, Tacoma. Carstens Pkg. Co., Plaintiff in Error, vs. Louis Godo, Defendant in Error. Citation.

No. 2253. United States Circuit Court of Appeals for the Ninth Circuit. Received Mar. 7, 1913. F. D. Monckton, Clerk. Filed Mar. 13, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

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*In the United States Circuit Court of Appeals in and for the Ninth Circuit.*

CARSTENS PACKING COMPANY, a Corporation,

Plaintiff in Error,

vs.

LOUIS GODO,

Defendant in Error.

**Stipulation [Waiving Printing of Original Exhibits.]**

It is hereby stipulated and agreed by and between the parties to this action by their respective attorneys that the original exhibits, which have been forwarded to the above-entitled court on appeal in this cause, need not be printed, but may be considered by the Court.

FLETCHER & EVANS,

Attorneys for Plaintiff in Error.

TEATS, METZLER & TEATS,

Attorneys for Defendant in Error.

[Endorsed]: No. 2253. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Carstens Packing Company, a Corporation, Plaintiff in Error, vs. Louis Godo, Defendant in Error. Stipulation. Filed Mar. 24, 1913. F. D. Monckton, Clerk.

# In the United States Circuit Court of Appeals for the Ninth Circuit

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CARSTENS PACKING COMPANY,  
a corporation,

*Plaintiff in Error,*

vs.

LOUIS GODO,

*Defendant in Error.*

No. . . . .

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## Brief of Plaintiff in Error

Upon writ of error from the United States District Court for the Western District of Washington, Southern Division.

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### STATEMENT OF THE CASE.

The Plaintiff in Error, Carstens Packing Company, is a corporation owning and operating a packing house in the City of Tacoma. On the 27th day of May, 1911, and for many years prior thereto, the Defendant in Error, Louis Godo, was in the employ of the Plaintiff in Error as a carpenter and millwright, his duties taking him all over the plant in new construction and repair work and bringing him constantly in the vicinity of various kinds of machinery and appliances used in that factory. Godo,

at the time of the injury hereinafter referred to, was 53 years of age and had been a carpenter and mill-wright for many years. As a part of the plant the defendant operated a building called the "wool-pullery." In this "wool-pullery" was an elevator which operated from the fifth to the first floor. To the right of the elevator and a few feet from it was a shaft consisting of two uprights with the necessary tongues on each of said uprights, which constituted the track in which the counterweights of the elevator operated. Beneath said "wool-pullery" building, which is located on the tide flats in said city of Tacoma, there was a distance of from four to seven feet from the floor to the mud flats, and these two uprights, or guides, for the elevator counterweights extended from the top of the building down through the building entirely to the mud flats below.

The foundation or wall of the "wool-pullery" building extended clear down to the mud flats. Immediately outside of the "wool-pullery" building and joined on to said building is a wharf. Defendant in Error testifies that on the 27th day of May, 1911, he was ordered by the master mechanic of Plaintiff in Error *to go under the wharf and take a measurement to locate a tank.* (Trans. of Record, Page 67, 95, 99.) That he did not know how to get under the wharf. (Trans. of Record, page 67, 68.) That he made no inquiry. (Trans. of Record, page 97.) That he had been under the building before



constructing a foundation or forms for a foundation for a wringer under the "wool-pullery" building. (Trans. of Record, page 77 and fol.) That when going under the building at such times as he had been there before he had gone under on the side of the building some distance away from the elevator and on a different side of the building from the elevator through a door or opening which was left there for that purpose. (Trans. of Record, page 61-81.) That when he was ordered, as he testifies, to go under the wharf and take this measurement he knew the foundation of the building extended to the mud flats (Trans. of Record, page 98) and if he took the measurement from under the building it would be necessary for him to cut a hole through the foundation or wall of the building and put a pole through such opening so to be cut extending the pole over to the cap, which was a considerable distance outside the building, the distance to which he desired to ascertain. (Trans. of Record, page 98.) He further testifies that the elevator and the counterweight are the only obstructions under the whole building. That otherwise the entire space under this "wool-pullery" is open, except that over in a far corner is a tank and at a distance of some fifteen to twenty feet from the elevator is the wringer foundation upon which he worked. (Trans. of Record, page 94-95.) He further testifies that prior to the accident the counterweight, when the elevator

was operating, only came down to the level even with the first floor and did not go below the floor. (Trans. of Record, page 89-90.) Also that the guides or track on which the counterweight operated extended down to the mud flats clear through from the top of the building. (Trans. of Record, page 101, 107.) That sometime prior to the date of the accident the cable which was attached to the counterweight and operated it had broken loose from the counterweight. (T. of R., page 83, 111.) That the same had been repaired. (T. of R., page 111.) That the usual way to repair it would be to take a wind of the cable off the drum at the top of the elevator and thus lengthen out the cable and re-attach it to the counterweight (T. of R., page 111.) Knowing that the cable operating the counterweight had broken and had been repaired; knowing the usual method of repairing the same, being a millwright of many years experience, and having worked around this very plant for many years, when Defendant in Error, as he says, was ordered to go under the wharf to take a measurement, not knowing how to get under the wharf, without asking any questions of anybody, and seeing an opening where the siding had been taken off the side of the building, right by the side of the elevator, he procured a chisel and hammer and crawled under the building,—not under the wharf—knowing that some repairs had been made on the cable that oper-

ated the counterweight; knowing that the counterweight had broken from the cable; knowing that the counterweight weighed approximately 1700 pounds; it being light enough that he could see the guides or uprights extending from the first floor of said building down to the mud flats; knowing that the whole area under the said "wool-pullery" building was open excepting the place he chose, and knowing that he had never entered at this particular place, and having been under said building on several occasions before, Defendant in Error went to the space left open between the guides or uprights constituting the track of the counterweight and stooped over, lighted a match to hold out ahead of him to observe his surroundings and while stooping over immediately under said 1700 pound weight, the cable carrying which he knew had broken and had been fixed, and knowing the usual way of repairing the same, which was the method followed in its repair, the counterweight came down and crushed him causing his injuries. Thus far in this statement we have stated only what the Defendant in Error himself testified to.

The counterweight cable was repaired by two men, Byers and McArthur. They testify, merely on their recollection, that the repair was made only a few days before Godo was hurt, but the foreman in charge of these men, who kept the time book, made a practice of making entries in his time book

as to where and when the various men worked in order that the charges for such work might be made to the proper department. This time book shows, and it is not contradicted, that the counterweight cable broke and was repaired about the middle of January, 1911. (See page dated 1-21-1911 of Plaintiff in Error's Exhibit 10, same being opposite page on which appears clerks file mark, also T. of R., page 224 and fol.) The evidence of Byers and McArthur being purely from memory and almost two years after the accident and the time book not being discredited in any respect it cannot be disputed successfully that the counterweight cable was repaired in January, 1911, and from that time on down to and succeeding the time of the accident in May, it let the counterweight come down below the floor in the same manner that it did on the day of the accident. In the month of April or the latter part of March, 1911, Defendant in Error was working under the building, building forms for a wringer foundation. He could see all the surroundings and conditions and testifies that he sat upon a box within 18 feet of the counterweight for approximately half an hour waiting to begin his work. Thus it will be seen that he worked in close proximity to the counterweight after its change and he admits on cross-examination that if the change was made before he built the forms for the wringer foundation it was his duty to see it and that he could



have seen it. (T. of R., page 90, 101 and fol.)

Defendant in Error's only complaint or allegation of negligence is that the master mechanic failed to warn him of the danger of being struck by the counterweight *under the building*, when he ordered him, as Defendant in Error testifies, *to go under the wharf*.

Defendant in Error testified that the "wool-pullery" house was built in 1906 and that he helped install the machinery. (T. R., 57-62.) He saw the counterweights operate after they were installed; that they came to six inches above the joists under the first floor and weighed seventeen to eighteen hundred pounds. (T. of R., 63-34.) He boarded these weights in between the first and second floor. (T. of R., 64.) He worked on the wringer foundation near these weights between the 15th and 20th day of April, 1911, and at that time the weights came to the floor above. (T. of R., 67.) That on May 27th, 1911, Mr. Cornils told him to go under the *wharf* and get measurements for a tank which was to be let into the wharf outside of the "wool-pullery" house. (T. of R., 67.) That he could not get under the wharf so he and his partner got a chisel, hammer and a pole about 20 feet long and went under the building; *that no one told him to do this* but he thought that he would cut a whole in the side of the building from under it and stick his pole through and ascertain the distance



from the building to the cap under the wharf so as to make his measurements for the tank which was to be let into the wharf outside of the building between this cap and the building. *That all under the building was open and he could have gone around the space between the grooves through which the counterweights operated* but that it was muddy under the building and he took the shortest way which lead him through these grooves; that he stopped between the grooves, within which a 1700 pound weight operated above him, to light a match in order to see what was beyond and that at that time the weight came down in the regular operation of the elevator and hit him; *that he had never gone that way before and knew of no one ever having done so.* (T. of R., 69-91-93-94 to 97.)

One page 94 of the Transcript of the record he testifies as follows:

“Q. Wasn't it open so that you could go right straight ahead?

A. It was open, but, my God! the dirt there was there to crawl through. A man has to go on his knees. He wants to go the shortest route he can.

Q. It was dirty under there—you know under that packing-house it was just tide-flats and soft mud?

A. Certainly.

Q. And you could have gone straight ahead and gone around the elevator shaft entirely, couldn't

you?

A. I could have gone out that way by going 20 feet more—15 feet more.

Q. Looking at your plat here, you stated that you came in right there where the letter H is.

A. Yes, sir.

Q. You came down here to where the counter-weights are and started under?

A. Yes.

Q. You could have come right straight ahead and climbed over that studding, gone right straight and around to your point of labor, couldn't you, that you intended to go to?

A. I could do it.

Q. You could have done that, that was open?

A. That was open.

Q. And you could see it?

A. Yes, I could see it.

Q. You knew there was no counter-weights or anything else over there?

A. I did.

Q. Now, nobody told you to go under the counter-weights, did they?

A. They did not. *They told me to go under the wharf.*

Q. They told you to go under the wharf?

A. Yes.

Q. You do not know of any work being done under that packing-house over on the side beyond

the elevator shaft, along the wall adjacent to the new tank, do you, prior to that time?

A. No, sir.

Q. The only work that had been done under there at all was to put in this big vat over to the other side of the packing-house, wasn't it, and this wringer foundation?

A. Yes, sir.

Q. That was the only thing that would occasion any men to go under there at all?

A. Have to go under there to draw the water out the washer.

Q. You have never been under there at all yourself?

A. Never under there.

Q. Did you know of anybody that had been over there?

A. I did not.

Q. Did you know of any occasion that anybody would have to go in there?

A. Not to my knowledge.

Q. Did you know whether or not you could go under the wharf there at all?

A. I knew I could go through there by cutting a hole in the plank.

Q. Did you have anything with you to cut that away?

A. Yes.

Q. What did you have?

A. I had a hammer and chisel.

Q. You took a hammer and chisel and a pole twenty feet long?

A. Yes.

\* \* \* \*

Page 97.

Q. What you were to do was to get the measurement from the building, from the foundation, over to this cap?

A. Over to that cap; yes.

Q. You say he told you to go under the wharf?

A. Yes.

Q. Why didn't you go under the wharf?

A. I could not go under the wharf.

Q. *Did you tell anybody you could not go under the wharf?*

A. *I did not.*

Q. You did not?

A. No.

Q. You went this same way because that suited your convenience to do that work that way, did you?

A. I had to do it because I always had to do what I was told.

\* \* \* \*

Page 98.

Q. You knew you could not get under the wharf at all, didn't you?

A. Not at the place I tried to first, but I knew

I could get a measurement by cutting a hole in the building over on that side.

Q. Over on what side?

A. On the north side of the building.

Q. Was that the only place you could cut a hole through?

A. By going under the wharf.

Q. It was the only place under the whole building where you could do that?

A. Well, I had to go to the place where I could make the measurement, that is the certain place where that plank was situated.

Q. You had never been there?

A. I ain't, but I know I could get through.

Q. But you did not know whether you could get through there or not?

A. I know I could not get through there unless I cut a hole in the wharf.

\* \* \* \*

Page 101.

Q. It was daylight when you went under there, wasn't it?

A. At that time it was light.

Q. There was a hole the light came through?

A. Yes, there was a hole the light came through.

Q. And you could see the general surroundings?

A. Yes.



Q. You could see that was the place where the counterweight run?

A. Yes.

Q. You could see the grooves on the plank, on the side of the counterweight shaft?

A. I could not see the grooves, but I could see the lead taps.

Q. You knew that was the counterweight track?

A. Yes.

Q. You could see generally the place right ahead of you?

A. I could.

Q. You knew it was all open under there with the exception of that space, didn't you?

A. Yes.

\* \* \* \*

Page 107.

A. I did not know the counter-weights run down, but I seen the guides.

Q. Were the guides there too?

A. Yes, sir.

Q. Was there anything there to indicate that the counter-weights came down?

A. Not that I could see.

\* \* \* \*

Q. They were there before you were hurt?

A. They were there.

Q. Never been any change in them, so far as

you could see?

A. No, not as far as I can recollect.

Q. Just the same clear up and down, they ran clear down in the mud?

A. Yes.

Q. Now, what do you suppose they put those guides there for?

A. That is more than I can tell you. Have them there to run the counter-weights on.

\* \* \* \*

Page 110.

Q. You knew that the counter-weight had fallen once—you knew the cable broke once and let the counter-weight down?

A. I knew the cable broke, but I did not know the counter-weight come down there or not when it was fixed.

Q. You knew if the counter-weight broke it would come down, if the cable broke?

A. I expect so.

Q. You knew it had broken.

A. I expected it had, yes.

Q. You knew it would be dangerous to be underneath if it broke again, didn't you?

A. I knew it would be dangerous; yes.

Q. You knew at the time you went under there, or started to go through there, you knew the counter-weight had broken and come down?

A. I knew the cable was fixed, yes.

Q. You knew the cable had broken and the counter-weight come down, did you not?

A. Yes.

Q. And yet you went through there or tried to?

A. How?

Q. Yet you tried to go through?

A. It was fixed when we tried to go through there.

Q. You knew there had been some change made there?

A. *I knew there had been a change made or they had fixed it.*

Q. You knew it had been fixed. Now, what would be the simplest way to fix it?

A. Raise the weight up to its place again where it was, or else tie on to your weight where it was, and then board up the hole so that nobody could come up into dangers.

Q. Wind off the drum one wrap of the cable, and connect the cable with the weights and then wind it on, if that could be done, that is the way to do it, isn't it?

A. That is the way to do it.

Q. Yes.

\* \* \* \*

S. P. Byers, a witness for the defendant in error, testified, page 21, transcript of record as follows:

Q. Do you know whether or not he (defendant

in error) knew that you had fixed the counterweight?

A. Yes, he knew that I was working at it.

Q. Did you ever see Godo under the building near where the counterweight operated?

A. You mean at any time?

Q. Yes.

A. Yes.

Q. How many times?

A. I couldn't say.

Q. More than once.

A. Yes.

Nels Olson, a witness for the defendant in error and who was with him when he was injured testified on page 127, transcript of record as follows:

Q. That packing house was all open under there with the exception of the shaft?

A. Yes.

Q. Now as a matter of fact it was muddy all underneath there?

A. Yes.

Q. And wet?

A. Yes.

And on page 128 as follows:

Q. Did you ever know of anybody going under that packing house at the place you went under?

A. No sir.

Q. Did you ever know of anybody going under there and under these counterweights too?

A. No, sir.

Q. Did it have the appearance of anybody having gone in there, that you can tell?

A. No, sir.

\* \* \* \*

Q. Was there anything said there at that time?

A. Pete said 'for God's sake, why didn't you tear up the planks instead of going underneath the building?' Pete said to him.

Q. That was when you brought him out from under the building?

A. After he was sitting on a plank.

This witness testified that after the injury to the defendant in error he, the witness, made the measurements by taking off a plank in the wharf outside of the building. (T. of R., 136-137.)

Wm. McArthur, a witness for the defendant in error, testified that he thinks he and Byers repaired the cable on the counterweight the last of April or the first of May but it may have been earlier. (T. of R., 149.) *That they repaired the cable in the usual and proper way.* (T. of R., 153.)

H. E. Hansen, a witness for the defendant in error, testified on page 156 of Transcript of Record as follows:

Q. Did you see Godo (defendant in error) and Pete Cornils just before this accident?

A. Yes.



Q. Where?

A. Mr. Cornils at a bench, and Godo was over there. They worked over there and had a bench. I do not know what he done because that was not my business to attend to what he did, and I had nothing to do with them, but they were working on that bench there. I was putting a pipe in. I was down to put my brace and screw-driver away. I was just by the corner and at my box. Cornils came along and said to Louis, "*I want you to go with me and take measurements,*" and he walked out. That was all it was.

Mr. Cornils, foreman of plaintiff in error, testified that the wringer foundation which is under the building and near the counterweight and upon which the defendant in error worked for several days was put in after the cable was repaired. (T. of R., 176.) That the change in the cable was made in January, 1911. That defendant in error worked on the wringer foundation near the counterweight in April 1911 and was injured on the 27th of May 1911 and this witness on page 177 testified as follows:

Q. Was that vat to go into the building or outside of the building?

A. The vat was to go outside of the building.

Q. Did you give Mr. Godo any instructions in reference to the placing of that tank and making measurements for it?

A. I had the tank there; it was too long. I told Mr. Godo to take up this plank, get a peevy and take up that plank, and find the girder there and take the measurements from that girder, and cut down the tank to fit it.

Q. Did you show him the plank you wanted him to take up?

A. Yes, sir.

Q. Were you standing there close to the plank?

A. Yes, standing very close by when I told him to take up the plank.

Q. Did you at any time tell him not to take up the plank or Tom would give him hell?

A. No, sir.

Q. Did you ever make any similar remark of that kind to him?

A. No, sir.

Q. Did you ever indicate to him he was not to take up the plank?

A. No, sir.

Q. Did you know that he was going under the glue-house to attempt to make the measurements for that tank?

A. *No, I did not.*

Q. *Did you ever direct him to go under the glue-house or wharf?*

A. *No, sir.*

\* \* \* \*

Q. What was said between you and Godo, if anything?

A. Well, I stepped up there; my first impression was, I said, "For God's sake! What did you go under there for? Why didn't you take up the plank as I told you?"

\* \* \* \*

Q. What did Godo say?

A. He said, as much as I understood it, I do not know why I did it.

Q. He said something to you?

A. That is the expression I understood from him, I do not know why I did.

Q. I think I asked you, you superintended the building of the glue-house originally? You were there and superintended the original construction of the glue-house?

A. Yes, sir.

Q. You knew the foundation went clear down to the mud?

A. Yes, sir.

Mr. H. B. Clark, witness for plaintiff in error, testified on page 201 of Transcript of the Record as follows:

Q. You got down there very soon?

A. Immediately.

Q. Mr. Clark, I will ask you if Peter Cornils was there?

A. Yes, sir.

Q. I will ask you whether you heard any conversation or remark made by Cornils to Godo at that time?

A. I did.

Q. What was it?

A. As near as I can remember Mr. Cornils explained to Godo something like this: "What in the world were you doing under there?" or you have no business there, something to that effect.

Q. Do you recall what if anything Godo said in reply?

A. Why, I do not.

Q. You do not pretend to repeat the exact words of the exclamation?

A. No, sir.

Q. That is the substance so far as you are able to recall it?

A. Yes, sir.

Chas. S. Lundgren, a sub-boss and timekeeper for plaintiff in error testifies that the counterweight was repaired *on the 16th and 17th days of January, 1911*, which was prior to the time defendant in error worked on the wringer foundation near this counterweight, which work was done in the following April. (T. of R., 224.) That he kept the time and indentified his time book which has an entry of this work on page dated 1-21-1911 and marked with the clerk's file mark of Exhibit 10. (T. of R., 225 et seq.)

The only complaint or charge of negligence is that plaintiff in error should have warned the defendant in error of the danger of being struck by the counterweight under the *building*, defendant in error having been instructed to make measurements by going under the wharf, as he testified, without any one knowing that he intended to go under the building, without any directions so to do, and it being admitted that no one had ever been known to pass under the counterweight space, the entire under part of the building being open and affording free access and there being no reason for passing under the counterweight except that the defendant in error claims that it was a shorter and perhaps a more convenient passage, it also being known both to the foreman who gave the directions and to the defendant in error that the side of the building extended to the ground and there was no way to get under the wharf by going under the building. There was no complaint that the elevator or counterweight were in any manner defective. It was known that the counterweights had been repaired and that the proper and usual way to make such repair was to lengthen the cable and that the elevator was then in its usual and ordinary operations. No one knew or had reason to know that the defendant in error was even intending to go under the building much less attempt this dangerous passage under the counterweight.



## ASSIGNMENT OF ERRORS

The errors committed by the lower court upon which the Plaintiff in Error (defendant below) relies for reversal of this action are as follows:

## I.

The court erred in denying the motion of defendant (plaintiff in error here) for a non-suit in this cause made at the close of the plaintiff's case in chief. Said motion being made upon the following grounds:

- (1) That plaintiff has failed to prove a cause of action as laid in his complaint.
- (2) That there is an absolute failure of proof of any negligence on the part of the defendant.
- (3) That the accident was due to contributory negligence and want of due care and caution on the part of plaintiff.
- (4) That the condition was open and apparent and plaintiff assumed whatever risk there was.

(T. of R., 44-171.)

## II.

The court erred in refusing to grant defendant's first requested instruction for a directed ver-

dict. Said requested instruction appearing in bill of exceptions, page 256 and being as follows: "You are instructed to return a verdict in this cause in favor of the defendant." (T. of R., 25-44-292.)

### III.

The court erred in denying defendant's petition for a new trial of this cause. (T. of R., 40-41-47.)

### ARGUMENT

All of the assignments of error argued raise the same question as to the sufficiency of the evidence to justify the verdict, contributory negligence on the part of the defendant in error and that he assumed the risk. We, are, therefore, arguing them as one assignment.

Under the facts as detailed above would the master owe a duty to this servant to warn him? The law requires the master to warn an inexperienced servant of the dangers of his employment which are not obvious, open and apparent to such inexperienced servant. This rule, however, can have no application in the case at bar for Defendant in Error was accustomed to working around machinery—a millwright of many years experience—and had been in this factory, around its machinery, for many years.

In *Labatt on Master and Servant*, at Section 438 we find the following:

"The principle that a servant, when he is

directed either by his master, or by a fellow employee under whose control he is placed, to perform a certain piece of work, or to perform it in a certain place, will ordinarily be justified in obeying the orders so given without being necessarily chargeable with an assumption of the risks incident to the work, has been recognized in several cases. For practical purposes, however, this principle is not of much importance, *as the ultimate question to be determined* in this as in all other classes of cases when the defense of an assumption of the risk is put forward is simply whether the servant had knowledge actual or constructive of that risk and encountered it without being subjected to what the law regards as coercion.”

The same author in Section 433 in discussing the question of orders given by a superior to a servant has the following to say:

“\*\*\* As a condition precedent to establishing his right to recover for an injury, on the ground that it resulted from his compliance with a specific and direct order, the servant must establish the following propositions:

- (1) That an order was given.
- (2) That the order, if not given by the master himself, was given by his representative, within the scope of the authority conferred on him.
- (3) That the act which led to the injury

was done in obedience to the order.

- (4) That the order was a negligent one under the circumstances."

Now let us briefly analyze the situation and see whether in the light of the evidence of Defendant in Error, these conditions have been met. Defendant in Error testifies that he was ordered to go under the wharf; that he did not know how to get there: that he made no inquiry; that he had been under the building before; that he knew where the elevator was; that he knew where the counterweight operated; that he knew the guards or track for the counterweight extended down to the mud flat; that the cable which operated the counterweight had broken: that it weighed approximately 1700 pounds; that it had been repaired; that the manner in which it was repaired was the usual and ordinary way; that practically all the space under the whole building was open excepting the elevator space and the counterweight space. These things were actual knowledge possessed by the Defendant in Error. He was a man of many years experience as a millwright; had worked around this plant for many years and must have known the danger from this counterweight. Under these circumstances could the master be expected to know that this experienced millwright would do so fool-hardy a thing as to place himself in this situation of danger? The Defendant in Error knew that the cable had broken; that the counter-

weight fell; that it had been repaired, yet knowing these things and knowing that the usual manner of making this repair was the identical way that it was repaired, he stands between the two uprights until the counterweight hits him. For the sake of argument let us suppose that the cable had again broken and the weight had fallen and injured Defendant in Error, could it be said that he was not guilty of contributory negligence, or that he did not assume the risk of injury?

For the sake of argument let us suppose that Defendant in Error, an experienced man, applied to the Plaintiff in Error for a position as millwright, his duties as such would carry him all over the plant, and suppose, being a new employee, he was *really ordered to go under this building*, instead of under the wharf, and could observe the conditions as Godo did observe them, should the master anticipate that this old experienced man would go immediately under and between the two uprights, constituting the guide and track of the counterweight, and stand there knowing the elevator was being operated, and knowing that these guides were put there for the counterweight to operate on? We do not believe that any master would be required to warn any servant under that condition. But they say it was a changed condition. In examining the cases in the books we fail to find any case where the facts are parallel to this one. The doctrine which has grown



up requiring the master to notify the servant of a change of an appliance, which would make it dangerous without such warning to the employee, is confined exclusively in almost all the cases to where the employee worked in a new location or with a specific machine or appliance, not to a man who is supposed to be an expert experienced man working around machinery and whose duties call him to every part of the buldings and in close proximity to every kind of machinery.

It is a well know rule that an employer cannot be held liable for failure to warn a servant unless the necessity for such warning be evident to the master, otherwise the master is justified in assuming that the servant understands the dangers and would take appropriate means to guard himself.

As the order was given to "*go under the wharf*" can it be assumed that the master mechanic who gave the order could know or believe that Godo would not know how to *get under the building*? Can any stretch of the imagination cause this court to believe that in order to take a measurement for the construction of a tank in the wharf, which can be done by taking off a plank in the wharf and measuring from the building to the cap, that Godo would go under the adjoining building, take a chisel and hammer and cut a hole through the foundation? Can the court say by any stretch of the imagination that a man who knew what this Defendant in Error tes-

tifies and admits that he knew, would go upon an errand about which he knew nothing without making inquiry, and in the light of Defendant in Error's admissions can it be said by any stretch of the imagination that the master mechanic could know that Defendant in Error would not know as much about the condition as did he? Before the master can be held liable to warn, it must be shown that he not only knew of the danger but had reason to believe, exercising that reasonable care required of the master to the servant, that the servant had not the means of knowledge and of protecting himself. It would seem in this case that there has been a total failure of proof of any negligence on the part of the Plaintiff in Error.

If the order was given to Defendant in Error to go under the wharf and take a measurement, it was a general order and there was no haste, no command and no suggestion of route or method to be used, and it became incumbent upon the Defendant in Error to use all reasonable care in going about the execution of said alleged order, that the conditions would indicate were necessary to keep him from harm.

*Consolidated Stone Company vs. Redmond,*  
55 Northeastern 454.

In this case it appears that Redmond was employed as a "wheeler" whose duty it was to wheel dirt, stone and rubbish.

“That while engaged in the work for which he was employed he was by the defendant, its agents and servants in charge of said quarry, ordered and directed to leave his said employment and to go and work under said channelling machine, and to obey the orders of the channeller,\*\*\*\*\* but that in giving said order the defendant and its agents in charge of said quarry and machinery carelessly and negligently failed to in any manner instruct the plaintiff as to the danger of the new situation, in working on said channeller and in adjusting the drills thereof in order to perform the work required of him.\*\*\*\*\*That, under his new duties it became necessary for him to without direct orders from any one, and without such orders he did, go upon the top of said machine and fasten or adjust such drills preparatory to letting them down in the groove.\*\*\*\*\*That by reason of his ignorance of such work and the danger incident thereto he placed his right hand in such a position on top of the channeller, that should the drill suddenly fall, the chain holding them would fall on his right arm; \*\*\*\*\*and instantly the drill and chain attached suddenly fell, caught his arm and injured it, and mashed and mangled it.”

In the opinion beginning at the bottom of page 456 we find the following:

“Turning to the interrogatories and answers a cursory review will readily demonstrate that the

facts thereby established preclude appellee's recovery, notwithstanding the general verdict. By these we find that appellee placed his arm beneath the chain to which the heavy drills were suspended; that he knew the drills were so suspended; that he held it there for a minute before the drills dropped; that he went upon the channeller without any specific command or direction of any one; that he was employed to do general work; that when he went on the channeller he selected his own position and his own mode of work; that he did not place anything under the chain to keep it from falling; that he did not perform the work he was doing in the manner that was ordinarily safest; that the accident occurred in daylight; that he had another and absolute safe way of doing the work so far as any danger of injury to his hand or arm was concerned. It is plain that the entire machinery with which he was working and the whole situation were open, obvious to appellee. He was bound to know that if he placed his hand under the chain, to which were attached drills weighing five or six hundred pounds, and the chain with such weights attached should fall upon it he would be injured. It was an open, obvious risk. He took no precaution to keep the chain from falling. He kept his hand under the chain for about one minute. He did not do the work in the ordinarily safest manner, and there was an absolute safe way of doing the work. There is noth-



ing in the record to show that appellant was under any legal obligations to give him special instructions or warning. A failure to warn or instruct creates no liability unless it is negligence and also such failure is the approximate cause of the injury. There is no negligence without a violation of some duty, and there can be no violation of a duty unless such duty exists. Under the facts specially found, it must be remembered that appellee was not ordered to perform extra-hazardous work outside of his employment; that, if there was danger in the service in which appellee was engaged, such danger was patent and obvious; that he chose his own manner of performing the service, and performed it without any command or direction of any one. Under such facts no duty was imposed upon appellant to warn or instruct him as to such danger.\*\*\*\*\*Concede for the sake of argument, that appellee was inexperienced in the work he was doing; yet appellant had the right to presume that he would exercise some degree of care to avoid injury, and that he would not place himself in a dangerous position unless such position was one which he was ordered to occupy.\*\*\*\*\*An employer is not liable for an injury to his employee that could not reasonably have been anticipated.\*\*\*\*\*We take it to be the law that if there are two ways of performing an act, one of which is attended with peril or danger, and the other is absolutely safe from danger the per-



son performing the act upon his own volition chooses the dangerous way and is injured, he cannot call upon his employer to respond in damages. \*\*\*\*\*Another well established rule is that, where danger is alike open to observation of all, both the master and the servant are on an equality and the master is not liable for any injury to the servant resulting from the dangers of the business in which he is engaged."

Defendant in Error testifies that he was ordered *to go under the wharf* and take a measurement, and that he did not know how to get there. He had been in the employ of Plaintiff in Error so long and was a man of such mature years and long experience that Plaintiff in Error had the right to presume, if the order was given, that he knew how to obey it and if he did not know the way it became his duty, as a reasonably prudent man, to inquire.

*Sauer vs. Union Oil Company*, 9 Southern (La) 566, in the opinion in this case, page 567 we find the following:

"The allegations of plaintiff's petition are that he was an employe of the defendant company; 'that he' was ordered by the foreman of said oil company to go and assist William Baker, also an employe of the company, in placing a belt on a meal crusher.\*\*\*\*\*The plaintiff introduced no evidence whatever relating to the accident, except his own oral testimony. The substance of that is, that he re-

ceived an order from the foreman, at a point remote from the meal crusher; that he received no instructions how to go there; that he selected his own route without inquiry, although he professes to have been ignorant of the surroundings; that he passed through and among the machinery of the mill; that in his own words, he 'crawled up' to a certain platform, where he was quietly standing, before he reached Baker or the meal crusher, when he was suddenly struck violently on the head by something which knocked him off the platform down to the lower floor.\*\*\*\*\*The defendant's witnesses prove that the route chosen by plaintiff was an improper and dangerous one, involving passage through machinery and over and under running wheels and belts, and that there were other proper and usual routes which were free from danger. Plaintiff claims that the foreman was guilty of negligence in not directing him how to go; but the proof shows that plaintiff had been working about the mill for a long time though he had been working in the interior only for two days prior to the accident. *Doubtless, the foreman supposed he knew or would inquire for the proper route, and surely, if he did not know, it was his duty to inquire."*

And the court in the above case held that no cause of action was proven and found for the defendant as a matter of law.

In the case at bar, the most that is claimed is

a general order to go under the wharf. Defendant in Error testifies that he didn't know how to get under, that he made no inquiry, chose his own route and in order to get under chose to go under the "wool-pullery," to stand under an elevator counter-weight, thinking to find a place in the foundation of the building where he could cut a hole through with his chisel and take the measurement. No foreman could be expected to anticipate such foolhardy conduct on the part of an experienced millwright.

*Lothrop vs. Fitchburg R. Co.*, 23 N. E. (Mass.) 227.

In this case the plaintiff was acting under general orders of the conductor of the train to do certain shackling on cars standing on the track, but the conductor gave him no specific directions to make the particular shackling which caused the injury complained of, but such cars were part of the cars standing on the side track and it was the duty of the deceased to do this particular shackling under the said general orders. There was a safe way to do the shackling but plaintiff chose the dangerous way and the court says:

\*\*\*\*\*The general rule of law is that when the danger is obvious and is of such a nature that it can be appreciated and understood by the servant as well as by the master, or by any one else, and when the servant has as good an opportunity as the mas-

ter or any one else, of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of care, the servant cannot recover against the master for injuries received in consequence of the condition of things which constituted the danger."

*English vs. C. M. & St. P. Railway Company,*  
24 Fed. 906.

"Where, the servant has equal means of knowing the danger so that the master and servant stand equal in that respect, and the servant is not specifically commanded as to the time and manner in which the work may be done, but is told to do a particular thing, and has such discretion that he can have some control over the means, time and manner of doing the work, then, unless he does it in a way and with the means which will be safest, he is guilty of contributory negligence."

*Weed vs. C. St. Paul M. & O. Ry Co.* 99 N.  
W. (Neb.) 827.

"A servant, who, from the length or character of previous service or experience, may be presumed to know the ordinary hazard attending the proper conduct of a certain business, is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment as if he were ignorant of or inexperienced in the particular work."

In the opinion at page 829 we find the following:

“\*\*\*\*\*The plaintiff was standing near, and the conductor ordered him to catch the car. That was the only order he gave. He left to the brakeman the determination of the question as to how the car should be caught. He knew that the plaintiff was a brakeman of many year’s experience; that he knew as well as he all about the danger of catching the car and the best method to be employed in doing so. He did not have time to instruct plaintiff how to execute the order, and if he had had time he would, as argued by defendant’s counsel, have made himself ridiculous by attempting to tell plaintiff how to do a thing which the plaintiff knew how to do as well as, and perhaps better, than he. In our view of the case the order given by the conductor was a proper one; and if so then negligence cannot be imputed to the defendant by reason of his having given it.”

This is merely another instance of a general order given and the servant adopting his own means to perform it, and there is no negligence shown and no liability.

The master has a right to assume in the case of an experienced man of mature years, who has been working around a particular factory for a long term of years, that such experienced servant, especially a millwright, who was as familiar with the plant and the repairs and the changes and the conditions as the superintendent himself, constantly



working around machinery when in operation, would use all available precaution to protect himself and further had the right to assume that if an order was given to such a servant and he did not know how to perform it, that the experience and mature years of the servant would cause him to make inquiries. The master is not compelled to be eyes and ears for the servant.

*Harrison vs. Detroit Y. A. A. & J. Ry.* 100 N. W. (Mich) 451, at 454 of the opinion we find the following:

“\*\*\*\*\*The employe is, as matter of law, held to have assumed the risk of all such dangers incident to the employment as he knows to exist or should have acquainted himself with.\*\*\*\*\*The rule is recognized by plaintiff’s counsel, but it is contended that in the present case the plaintiff should not be held to have assumed the risk for the reason that Harrison was not informed that the high tension wire came within one foot and six inches of the end of the trolley pole when placed on a direct line from the trolley stand and that the trolley pole was therefore in danger of coming in contact with the high tension wire while the attempt was being made to remove the pole; that it was not shown that Harrison was instructed or knew that it was dangerous to remove the trolley pole on the side of the car toward the high tension wire; that he was not instructed that if the trolley pole came within one-

half inch of the high tension wire electricity would arc.

Were instructions of this character essential before it be said that deceased assumed the risk? He knew of the fact that contact between the trolley pole and the high tension wire would be exceedingly dangerous. Indeed, contact between the pole and trolley wire with the pole removed from the socket was dangerous only in a less degree. He certainly knew that this wire was near enough to be reached by the trolley pole upon its being removed from the socket. Knowing, as he did of the high voltage in the conducting wires it would seem obvious that during the term of his employment he should have noticed that they were near enough to come in contact with this pole if the pole was directed toward them.

“\*\*\*\*\*The contention of plaintiff gets down to this; that he should have been told the precise location of this wire with reference to the top of the car and that the wire could be reached by a pole of the length of the trolley pole. These facts were open to his observations and to the observation of every employe who passed over this road.\*\*\*\*\*In the present case we think the danger was obvious and it was assumed, and upon this ground a verdict should have been directed for the defendant.”

So in the case at bar the Defendant in Error knew of the danger from getting under that coun-

terweight. He knew it had broken loose once and had fallen, and that it might break loose and fall again. He knew that after it broke it had been repaired, and he knew the usual way to repair it was to take a wind of the cable off the drum and then re-attach the weight to the cable. He knew that would naturally lengthen out the cable and let the weight come lower. A water boy would have known it was dangerous to stand between these uprights at any time. The condition was dangerous all the time when there was knowledge that the weight had once fallen and with that knowledge, the knowledge of a change having been made, a millwright of this man's experience who would deliberately stand between the uprights constituting the track upon which operated a seventeen hundred pound weight was guilty of gross negligence and certainly assumed the risk when he went there.

*Williams vs. L. & N. Ry.* 64 Southwestern  
(Ken.) 738.

In this case the court quotes with approval from Thompson on Negligence as follows:

"If the servant knows or by the exercise of ordinary observation could discover that the premises in which he is to labor are unsafe or unfit in any particular and if, notwithstanding such knowledge or means of knowledge, he voluntarily continues in the employment without objection or complaint. he is deemed to assume the risk of the danger thus

known or discoverable and to waive any claim for damages against the master in case it shall result in injury to him."

Again in said opinion the learned court quotes with approval from Bailey on Master's Liability for Injury to Servant as follows:

"The servant must use reasonable care in examining his surroundings to observe and take such knowledge of dangers as can be obtained by observation. If he fails to do so, the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person using his eyes and if the defect is obvious and suggestive of danger, knowledge on the part of the servant will be presumed. The duty of the master in such cases is not to see that the servant actually knows. He has a right to rest upon the probability that anybody would know what was generally to be seen by his own observation. Negligence in a servant often consists in failing to know as well as in failing to do, and such is always the case when it is his duty to inform himself and know."

In this case when Defendant in Error received the alleged order, if he did receive it, and did not know where to go or how to execute it it certainly became his duty to inquire and inform himself. Nobody, however, commanded him to go under the building. He does not so contend. Nobody told him to go any place that would take him under the



counterweight. No order was given, nor is it so contended, that in itself would suggest any remote degree of danger. By his own choice, by his own failure to inquire, by his own carelessness, by his own failure to use the knowledge he had, and to use his God-given senses he was injured. He should not be permitted to mulct his employer for damages in such a case.

*C. I. & L. Ry. Co. vs. Tackett*, 71 N. E. (Ind.)  
524:

“Where plaintiff in an action for injuries resulting from a defective brake averred that he did not know and could not see or know the brake was out of order, it was necessary, to sustain the allegation, that the evidence show that he had no knowledge of the defect, and could not have known of it by the exercise of ordinary care.\*\*\*\*\*.

“Where defects in appliances are such as to be obvious to a person giving attention to the duties of the occasion, the employe is required to observe and avoid them, and may not rely upon a ~~presumption~~ <sup>presumption</sup> against his own senses.”

In the opinion the court says, page 527:

“To sustain the allegation it was necessary that the evidence show not only that he had no knowledge of the defect and the danger, but that he could not have known it by the exercise of ordinary care\*\*\*\* That he did not know the danger to which he thus



exposed himself must be taken as an established fact, but that, in the exercise of reasonable care, he would not have known it, is a different proposition. That he did not know it is a fact consistent only with his failure to use his eyes and opportunities for his own protection. Such failure on his part prevents a recovery against the employer as effectively as would the possession of the knowledge which he might thus have acquired. The mutual right of the parties depends upon the actual facts connected with appellee's injury."

*Evansville & R. R. Co. vs. Barnes*, 36 N. E.  
(Ind.) 1092.

In this case in the opinion on 1092 the law is well stated thus:

"\*\*\*\*\* It is an elementary principle of law governing the relations of master and servant that when a servant enters upon an employment which is from its nature necessarily hazardous, the servant assumes the usual risk and perils of the service, and this is especially true as to all those risks which require only the exercise of ordinary observation to make them apparent. In such cases, this is an implied contract on the part of the servant to take all the risks fairly incident to the service and to waive all right of action against the master for injuries resulting from such hazards. This waiver includes, on the part of the servant, all such risks as from the nature of the business, as usually and ordinarily

conducted, he must have known when he embarked in the master's service, and also those risks which the exercise of his opportunity for inspection, while giving diligent attention to such service, would have disclosed to him.

*McGlynn vs. Brodie, et al*, 31 Cal. 377.

“If an employe works with or near machinery which is unsafe and from which he is liable to sustain injury by reason of its being unsafe, *with the knowledge or means of knowledge of its condition*, he takes the risk incident to his employment and cannot maintain an action against his employer for injury sustained by reason of the defective condition of the machinery.”

In the case at bar, can it be contended seriously that with the knowledge Defendant in Error had, that he did not have the means of knowledge at his command to know the exact condition of the counterweight? He knew it had broken. He knew it had been repaired and he knew the customary method of change or repair would permit the counterweight to come lower. If he used his faculties and the means to know for his own protection there was no need of warning.

*Sievers vs. Peters Box & Lumber Company*,  
50 N. E. (Ind) 877.

In the syllabus of the above case we find the rule stated thus:

“Where plaintiff employe, by the exercise of or-

dinary care, would have known that a freight elevator was not provided with safety appliances, he assumes the risk attendant to carriage on it."

In the opinion at page 878 we find the following:

"\*\*\*\*\* Appellant knew, prior to his injury, that a new freight elevator was in process of construction, and he did not know or have any reason to believe that it had ever been operated before the day he received his injuries. Said appellant was a practical carpenter, of many years' experience, and said elevator was so constructed that it was apparent to any person of ordinary intelligence, looking at the same, that it was intended to carry freight only, and not passengers; and appellant could, by the exercise of reasonable care at the time he went on said elevator, have discovered that said elevator was intended for carrying freight only, and that the same was not provided with dogs, clutches, and brakes. There were safe and suitable stairways provided by appellee for appellant and other employes to go from the first to the third floor of said factory, and the new addition thereto; and appellant had frequently used the same, and was familiar with them and their use for going to the place where he was working on the day of his injury, and the appellant had no duty to perform with reference to said elevator, and could have gone safely to his place of work at the time of the injury

without going upon said elevator, and could have performed all of his duties for which he was employed by appellee without going upon said elevator.

\*\*\*\*\*The jury also found that appellant, by the exercise of ordinary care, would have known that the elevator was not provided with such safety appliances as dogs, clutches, or brakes. Under such circumstances, even if appellant rode upon the elevator at the invitation of appellee, he assumed the risk incident to carriage upon it."

*Hardy vs. C. R. I. & P. Ry Co.*, 115 Northwestern (Iowa) 8.

In the syllabus we find the following:

"A master may presume that an adult servant is competent, and that he appreciates the dangers ordinarily incident to the work.

"An obvious danger, with reference to the character of the employment, is one that is discoverable in the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety.

"An employe, engaged in blasting, who knows, or ought to know, the danger in charging a hole with powder within a few minutes after springing the hole, is not entitled of right to a warning; a master being under no duty of warning or instructing a servant as to dangers discoverable by the exercise of ordinary care, with such knowledge and judgment as the master is justified in believing that the

servant possesses.”

*Swiercz vs. Illinois Steel Company*, 83 N. E. (Ill.) 168. In the syllabus the Supreme Court of Illinois states the rule thus:

“If a master negligently gives an order in obeying which the servant is exposed to danger, which he would not otherwise encounter, the master may be liable for an injury sustained; but an order given to a servant in the ordinary course of his employment, though the act is dangerous, does not make the master liable for an injury which he could not be expected to anticipate.”

It is not claimed in the case at bar that the order was negligently given or that it was given as other than a general order to go under the wharf and take a measurement. There is no defect claimed in the machinery and no negligence charged excepting failure to warn, and there was surely no duty to warn this millwright to keep out from between the two guides in which operated the counterweight of seventeen hundred pounds which he knew had broken, had been repaired, and if repaired in the ordinary way, would be in the exact condition that it was when he carelessly stood beneath it and was injured.

*Kerker vs. Bettenderf Metal Wheel Company*, 118 N. W. (Iowa) 306.

This court lays down the rule in the following language:



“The duty of the master as to warning and instructing a servant arises only where he knows, or ought to know, the youth or inexperience of the servant.”

*St. Louis I. M. & S. Ry. vs. Jamison*, 113 S. W. (Ark.) 41.

“The fact that a foreman of railway section hands ordered one of them to break the bolt by which another of them was injured did not render the master liable, where he did not direct the manner of breaking it, and the order was not negligently or improperly given.”

*Western Union Telegraph Co. vs. Burton*, 115 S. W. (Texas) 364.

“A servant assumes the risk of all dangers resulting from the master’s negligence, the existence of which the servant knows, or could have learned by that degree of care which a prudent man would have used under the circumstances, so that if the servant knew that a wire was charged with a dangerous current, or was warned of such fact sufficiently to put an ordinarily prudent man upon notice that it might be, he assumed the risk of injury therefrom, and cannot recover therefor.”

In this case the facts show that the servant was ordered to do a dangerous piece of work. He could have ascertained the danger if he had taken the trouble. He neglected to do so and the court holds that he assumed the risk.

*Brownwood Oil Mill vs. Stubblefield*, 115 S. W. 626.

This case is one where a roustabout had been working a few days in an oil mill and had been given the position as oiler, taken to various places in the mill and shown how and where to oil and warned about certain dangers but not cautioned about that particular part where he was injured. The condition was open and apparent. In the course of the opinion the court says:

“\*\*\*\*\*The true test is, would a person of ordinary prudence, having his age and experience, placed in the same or a similar situation, have comprehended the danger and risk?\*\*\*\*\*

“Where the servant has equal facilities with the master for ascertaining the danger incident to the work in which he is engaged, he assumes the risk. *Or where the facts show that the servant is of mature years, and that the danger was open to observation to any man of ordinary mental capacity, and equally as apparent to the servant as to the master, there is no duty to instruct or warn the servant.*\*\*\*\*\*

“We cannot call to mind any fact, connected with the situation under which the appellee was injured, upon which a man of ordinary intelligence, and with the experience of the appellee, could have been enlightened by instructions from the foreman. It would be a foolish exaction to require the master to impart information which the servant knows be-

fore, and an injustice to hold him responsible for injuries resulting from ignorance of situations and danger which a person of ordinary prudence, under the particular circumstances should have known and avoided."

Plaintiff in that case had worked in mills where there was machinery, while not working with machinery had been in a position to observe. The court held that the employer had the right to assume that the servant would appreciate the ordinary risk. How much more true is it that when, as in the case at bar, the employer is dealing with an experienced man who is not confined to work on one machine or in one place but whose work took him to every corner of the plant and around every machine. The master should not be held in duty bound to instruct. If the master had ordered defendant in error to go *under the building* (which was not the order), knowing that defendant in error had worked under the building since the change was made and knowing that defendant in error had been in the employ of plaintiff in error for many years as a millwright and knew that a change had been made in the counterweight and that it had broken, and knew the weight of this massive counterweight, and the uprights which constituted the track for the counterweights being in plain sight, it would seem that the court was carrying the rule to an absurd extreme to require such a servant with such a knowledge to

be warned. But this servant was not directed to go under the building, if he was directed at all, but to go under the wharf, and certainly he cannot claim that by that order: first, that plaintiff in error had any knowledge that he had any intention to go under the building. Second, it cannot be contended that the master could conceive that this experienced man, with the knowledge he had, would go and stand under that heavy counterweight. Third, it cannot be contended that the master should know or anticipate that any man knowing that these guides were made for the counterweight to run in and knowing that a change had been made would deliberately go and stand under it. Fourth, nor can it be contended that the master should presume that any sane person knowing that a counterweight weighing seventeen hundred pounds which was suspended by a cable which had broken, and that the guides for the track or counterweight extended clear to the mud flats would go deliberately and stoop over and stand right beneath that counterweight. Fifth, nor can it be contended that the master should anticipate a millwright of defendant in error's experience, knowing the cable had broken, that the counterweight had fallen, that the weight had been reattached to the cable, and that the usual and customary way for repairing the break was the identical way in which the break was repaired, would go and stand under that counterweight. Sixth, nor can it be contended



that the master should anticipate that a servant having worked in close proximity to this counterweight after it was changed and having his opportunity to know of the change, and having been advised of the break and the repair would go voluntarily and stand between the guides in which operated the counterweight weighing seventeen hundred pounds.

Before the master is under any duty to instruct the servant he must have good reason to believe that the servant does not know of the danger or that the danger is hidden or is so concealed that the servant, by the use of ordinary care, cannot protect himself. In this case after the order was given which was a general order to go under the wharf and take a measurement, *Defendant* in error says he did not know how to go. He was a man of mature years and a millwright experienced in the business, and yet he failed to inquire, selected his own route, failed to observe conditions of which he certainly had warning, in the light of his testimony, ~~then~~ he should not now be heard to say that the master was negligent in failing to warn him.

*Horan vs. Gray & Dudley Hardware Company*, 48 Southern (Ala.) 1029.

In this case in the opinion we find the following :

“Plaintiff claims of defendant \$10,000.00 as damages for, that, on, to-wit, the 4th day of January, 1905, plaintiff was the servant or employe of defendant and engaged in the discharge of his duties



as such servant or employe, which duty was to go into the basement of a certain school building in Woodland, Alabama, to take measurements for cold air pipes to a furnace which was being placed in said school building by defendant through its servants or employes. Plaintiff avers that in fitting said furnace in said school building or preparing for its use or operation, defendants' said servants or employes acting within scope of their authority dug or excavated a ditch or hole in the cellar or basement of said school building near or adjoining said furnace, which ditch or hole was uncovered without guard or signal showing its excavation, and without anything to warn of its danger and which said ditch or hole was dangerous to any one working in said basement or cellar near said furnace and without knowledge of the existence of said ditch or hole. Plaintiff avers further that defendant's foreman, Ollie Chaddock, who had the superintendence intrusted to him and was then in the exercise of his said superintendence negligently failed to warn plaintiff of the excavation of said ditch or hole and as a proximate consequence of his negligent failure to warn plaintiff of the existence of said ditch or hole the plaintiff fell or stepped into said ditch or hole and injured, strained or broke his right leg or ankle."

One of the defenses interposed in that case was as follows:

“Defendant says that plaintiff proximately contributed to the injury complained of in this; *plaintiff knew that it was usual and customary in installing furnaces and heating plants in buildings in many instances to dig a ditch or make excavation for the cold air pipe or other pipes connecting with said furnace*; and hence plaintiff knew or ought to have known by reason of that fact, that there was or might be a ditch or excavation in said basement, and without making inquiry as to the excavation of said ditch or excavation and without light negligently went into said basement.\*\*\*\*\* If the plaintiff had knowledge of the danger or the exercise of ordinary care could have known of it then defendant was under no legal duty to warn him.”

*Johanson vs. Webster Manufacturing Company*, 120 N. W. (Wis.) 832.

In the syllabus the rule is stated thus:

“The duty of the master to warn the servant of hidden danger arises only when the master has some reason to believe that the servant is ignorant of the danger and needs to be warned and in case of an adult of apparent usual intelligence the master may assume that he has knowledge common to the great mass of mankind, unless informed to the contrary, and in such case need not specifically instruct the servant of the dangers.”

To the same effect is:

*Cunningham vs. Bath Iron Works*, 43 At-

lantic (Me.) 106.

*Mugford vs. Atlantic G. & B. Co.*, 65 Pacific  
(Cal.) 674.

*Newman vs. S. W. Telegraph & Telephone  
Co.*, 47 S. W. (Tex.) 609.

*Boston vs. Harvard Brewing Co.*, 67 N. E.  
(Mass.) 356.

*O'Keefe vs. John P. Squire Co.*, 74 N. E.  
(Mass.) 340.

Quoting from the syllabus of the last mentioned case:

"A master, who told an experienced foreman to take men and clean a large room, which had not been in use for some time, and which contained a number of boxes, etc., had the right to assume that, in view of the nature of the work the workmen's experiences, and the obvious condition of the floor, no warning as to the defects in the floor was necessary."

*Jackson vs. Missouri Pac. Ry. Co.* 16 S. W.  
(Mo.) 413.

*Omaha Bottling Co. vs. Theiler*, 80 N. W.  
(Neb.) 820.

In this case the servant was put to work filling bottles with charged mineral water. The bottle broke injuring him. He claimed damages, the neglect charged being the failure to warn of the danger. At page 822 in the last column of the opinion the court says:

"There is another reason why the plaintiff is

not entitled to recover. The duty to warn him of the latent dangers, if any there were, was not an absolute one. The defendant was only required to do what a prudent master naturally would do under like circumstances. \*\*\*\*\*The danger that cider bottles would explode while being filled was not, to say the least, one obviously beyond the comprehensions of a boy of average intelligence 19 or 20 years old who had worked at the business for years and had recently been charged with the control and supervision of the bottling department of the defendant's establishment. It would indeed be an exceptionally prudent and cautious master who would deem it necessary to give cautionary instructions to his servant in such a case. The plaintiff knew how the bottling business was conducted. He knew soda water and mineral water bottles would explode occasionally under ordinary pressure, and it is scarcely possible that he was ignorant of the fact that cider bottles would also explode under high pressure. That he was ignorant of the hazards of the business we cannot believe, and to hold that defendant should have warned him of such hazards would in view of the circumstances, be requiring it to conform its conduct to an unreasonable standard of care."

Would a prudent master under the facts disclosed in the case at bar have deemed it necessary to tell Godo that that counterweight came below the floor, in the light of the admissions of Godo as to his

knowledge of the condition and the change, in the light of the alleged order given? See also *Central Granaries Co. vs. Alt* 106 N. W. (Neb.) 418-419.

There is another feature of this case which is worthy of consideration. The Defendant in Error testified that he chose to take the route he did for his own convenience because he thought it was not quite as muddy or dirty as to go by another route under the portion of the building where he had formerly worked. (T. of R. page 94, 95.)

*Hettich vs. Hillje*, 77 S. W. (Texas) 641.

In the syllabus we find the following:

“The question of a master’s negligence in failing to provide his servant with reasonably safe place to work does not arise, where it is clearly shown that the servant himself selected the place at which he performed the work for convenience’s sake and without any order or suggestion from his foreman, whereas, the work could have been done elsewhere without incurring the danger incident to the performance of the work in the place chosen.”

Defendant in Error admits that if he had inquired he could have learned a safe way to do the work. He also admits that he knew the space under the building was open excepting the place he chose to go and that he had been under the Packing House and observed it but he chose to go this way of his own volition and for his convenience.

*Bellows vs. Penn. & N. Y. Canal & Ry. Co.*



27 Atlantic (Penn.) 685. The syllabus lays down the rule as follows:

“A railway company is not negligent in failing to inform one of its experienced engineers who has run over its road for many years, and who is appointed to instruct an engineer on another engine in all the physical peculiarities of the road, that such engine is several inches wider than the one he had been accustomed to handle; and he cannot, therefore, recover for injuries sustained by his head coming in contact with the iron work of a bridge while leaning out of the cab window watching his train, though he could safely have done so in his old engine.”

*Smyth vs. Burgiss Sulphite Fibre Co.*, 74 Atlantic, 870. The syllabus in the last above case is as follows:

“An experienced millwright while repairing a machine was killed by stepping on joists on the floor in the rear of where he stood, when he moved back suddenly. The place was well lighted and the joists were in plain sight when he took his position in a place where employes went only to remedy defects in such machines. Everything was open to observation. Held, that it was unnecessary to warn him of such danger.”

In the opinion the court says:

“The only defect in the premises complained of is the presence of from four to seven pieces of hard pine joists at a point on the floor just in the rear of

where the deceased was standing. He was a mill-right of seven or eight years' experience in these mills, and the place was not one where employes would go except to remedy defects in the wet machines. The place was well lighted, the sticks were in plain sight when deceased took his position close by them and the claim was that he was injured by stepping upon or against them when he moved back suddenly upon the unexpected starting of the machine.

"Unless this was a danger which the ordinary man might think was such as to call for warning to Ouilette, the defendant's motion should have been granted. That no ordinary person would think of giving such warning to an experienced repair man seems plain. There was no concealed danger. Everything was open to observation. Ouilette must have known, the locality was not a regular work place, not one where people customarily went. It was clearly his duty to use his senses when going into such a place for the temporary work of making repairs. The defendant had the right to assume that he would do so and to take that into account in determining whether it was necessary to warn him."

*Beique vs. Hosmar*, 48 N. E. (Mass.) 338.

Quoting from the syllabus:

"The employer of an experienced workman is not rendered liable for injuries to the latter, who fell through an opening in a floor of a building under

construction, cut by authority of the contractor, by failure to guard the opening or warn the workman of the danger thereof, as such workman assumed the risk of his employment.”

In the opinion the court has the following to say:

“\*\*\*\*\*It appears, however, that the defendant and his superintendent knew for several weeks before the accident that the hole was there, and it is said that they should have covered or guarded it, or have warned the plaintiff of it. The plaintiff was an experienced workman. The building on which he was working was in the process of construction. Obviously, the condition of such a building is not a permanent one, but is liable to change as the necessities of construction require. An experienced workman must be assumed to know this and to have regard to it. It is one of the risks of the business in which he is engaged. To require his employer to warn him or to guard him against such a risk would be, therefore, to compel the employer to protect him from the risk concerning which, from the very nature of the case the employer would have no reason to suppose that the workman needed any warning or protection. \*\*\*\*\*Though the hole had been there several weeks there is nothing to show that the defendant had any reason to suppose that the plaintiff needed any warning or protection in regard to it.”

In the case at bar the track or guides in which the counterweight operated extended through the floor clear down to the mud flats and were put there in that manner for the very purpose of allowing the counterweight to come down. Defendant in Error knew in his experience as a millwright that cables will wear out and break. He knew that when that cable broke it would have to be reattached to the counterweight and the ordinary way of repair was to take a wind of the cable off the drum and re-attach the cable to the weight. This would naturally let the weight come further down in the guides or track which were already constructed for that purpose. Certainly this was warning enough to an experienced man who knew that a change had been made and knew what these guides or counterweight tracks were for.

*Ryan vs. Chelsea Paper Mfg. Co.* 37 Atl.  
(Conn.) 1062.

In this case a radical change was made in a machine and the plaintiff was allowed to recover. However, in the opinion at page 1063 we find the following rule laid down:

“The rule of law applicable to these facts is plain. If the change in machine No. 2 was merely an ordinary adaption of the machine to the purpose for which it was made, which a skilled operator must be presumed to anticipate—such, for instance, as the slight change necessary to keep the felt bands

at proper tension—the risk of injury was one assumed by the plaintiff in accepting his employment. On the other hand, if the change was one unknown in the ordinary use of the machine, made to adapt it temporarily to a special and unusual purpose, calling for a difference in operation, and greatly increasing the danger, then it was the duty of the defendant to notify the plaintiff before requiring him to operate the machine in its altered condition.”

In the case at bar the most that can be said about the change in the length of the cable was that it simply brought into use the track which was already constructed and had been since the installation of the elevator for the very evident purpose of allowing the counterweights to come down. It was not an unusual or temporary use but simply an adaption of the track to the use for which it was constructed, and when Defendant in Error knew the track was there; knew the counterweight operated in it; that it had broken and the change had been made, we think a man of his experience should need no warning at the hands of his master.

*Massey vs. Seller et al.*, 77 Pac. (Ore.) 397.

The above is an action wherein plaintiff went to the premises of the defendant on business and was rightly upon the premises and in the building of the defendants; that he went to the street to wait for the shipping clerk of the defendant; and testified as follows:



“\*\* ’So I turned to go outside of the door, to get outside again. I came pretty near to the door, and looked in there. It was a little dark in there. I didn’t find him. I thought maybe I would find a water closet in there, because I wanted to go to the closet, and I made a step or two, and I went right in the elevator.’ Later he continues, relative to the same incident: ‘But when I got there I seen this dark place. I thought it was a closet, \*\*\*\*\* It was very dark to me.’”

In the opinion on page 399, the court says:

“Now, if it was so dark in there that he could ‘see nothing,’ it was certainly an act of folly on his part to enter on a cruise of exploration and discovery without stopping to determine whether it was safe to proceed. To bolt headlong into a place little known, and where the senses cannot take note of it, is not the act of a prudent man, and there is no chance for any other inference or deduction concerning it. Reasonable minds could not come to any other conclusion touching it, so that there is nothing for the jury to determine, and the trial court very properly declared the result as a matter of law.

In *Johnson vs. Rambert*, 49 Minn. 341; 51 N. W. 1043, contributory negligence was imputed to plaintiff for not having looked where he was going in the light. Having entered a warehouse in which he had never been before, and meeting the defendant, he turned aside for him to pass, and in doing

so stepped off the head of a pair of stairs. It was held that the bare statement of the facts, together with the admission of the plaintiff that he could have seen the stairway if he had looked, and did not look, was proof inhibitory of his recovery. It was there observed that, 'while the plaintiff was permitted to pass through the wareroom into the store, he could not but know from the surroundings that the place *was not a passageway merely*, but that it was also largely, if not principally, devoted to the private uses of the proprietor connected with his business; and the plaintiff was not justified, either in closing his eyes as he went through, or in neglecting to observe where he went. He was not justified in assuming that the place was so free from obstacles and from the ordinary conveniences for business that he could move anywhere without paying any attention to the surroundings.' In *Bedell vs. Berkey*, 43 N. W., 308, the plaintiff attempted to enter a building by a way with which he was not familiar. To illustrate the condition, we quote from his testimony. He says: 'I saw a little light shining through here, ahead of me, just a dim light, and I walked up here, saw this light, took it to be an opening between the door, between the two sections, the middle and the north sections. I turned to my right, and, as I supposed was going through into this department through a door, and I stepped into a hole.' The court, in deciding that

the case should not have been left to the jury on account of the contributory negligence of the plaintiff, says, among other things: 'It was his business, if he found it (the room) obscure, to wait until his eyes got accustomed to the light before moving round at hap-hazard, without using any care whatever to know where he was going. No one has any right to endanger himself, or to disturb other people's arrangements, by moving round in the dark—if it is dark—in a strange room, into which he has entered of his own accord and without direction.' And in *Hutchins vs. Priestly, E. W. & S. Co.*, 28 N. W., 85, it was held *that it was contributory negligence as a matter of law for a person to attempt to pass heedlessly through an elevator shaft, supposing it to be a doorway.*"

Again toward the end of the opinion at page 400, we find the following:

"He could not have been injured if he had paid the slightest attention to where he was going, or if he had not bolted headlong into the dark corner. *He made no inquiry touching the object of his quest, and was heedless in proceeding in the dark without observing where he was going.*"

*Buttle vs. Geo. G. Page Box Co.*, 56 N. E. (Mass.) 583.

In the syllabus the court lays down the following:

"Plaintiff, at work at a band saw, was ordered

to oil the saw while it was in motion. The saw was oiled by pouring oil from a can into an oil cup in front of and above the saw. He attempted to reach around from behind the saw, and his hand came in contact with the teeth. The saw was in plain sight, and plaintiff knew that it was in motion. Held, that defendant was not negligent in failing to warn plaintiff of the danger to which he was exposed."

A verdict was had for the plaintiff and the defendant appeals, cause reversed. Plaintiff claimed that he was taken from his regular work to do this oiling and that it was more hazardous and that he was not warned of the danger, but the court holds that the jury were not warranted in finding that the plaintiff was not capable of appreciating the increased danger to which he was exposed when he attempted to oil the saw, that everything was open and obvious.

In the case at bar the Defendant in Error knew the counterweights operated in the upright track or guides and knew it had been changed; knew the usual and ordinary way to make the change. The condition was open and apparent and there was nothing in the case brought out which would give the Plaintiff in Error any idea that this millwright was going to place himself directly under that counterweight.

*Durrell vs. Hartwell, Williams & Kingston,*  
58 Atl. (R. I.) 448.

Quoting from the opinion:

“The declaration sets out that the plaintiff was employed by parties who were decorating a building in process of erection by the defendants as contractors. The defendants operated a temporary elevator, through openings left in the floors, for hoisting materials. The decorators used a staging, which was moved about as needed for their work. On August 26, 1903, the plaintiff was at work upon the staging, and it had been so placed as to project into the elevator well. The declaration also alleges that the elevator while in operation, hit the staging, knocking the plaintiff off and injuring him. Under these general facts, the declaration has four counts: (1) That the plaintiff was ignorant that the staging projected into the well, but the defendants knew, or by the exercise of due care could have known, that it so projected, and that they, without warning to the plaintiff, so operated the elevator that it was driven against the staging; (2) that it was the duty of the defendants to give notice to those at work on the staging when the elevator was about to be put in motion; (3) that it was the defendants’ duty to give notice, with the addition of plaintiff’s ignorance of the projection; (4) that it was the custom, in the operation of such elevators, to give notice. Three questions arise under these counts—the effect of the allegations of the plaintiff’s ignorance, the defendants’ duty of warning, and the alleged custom.



An allegation of ignorance amounts to nothing, when the circumstances stated show that the danger was obvious, and so must or should have been known to the plaintiff. \*\*\*\*\*In this case the fact that the staging projected into the elevator well was as obvious to the plaintiff as it could be to the defendants. He could easily have seen that a board overhung the hole in the floor. The operator of the elevator, three floors below, could only see the overhang, unless it was of a considerable extent, by sighting upwards, if there were anything to guide his sight. But if it were of considerable extent, it would be all the more apparent to the plaintiff.

As to the defendants' duty of warning, there is no sufficient allegation to charge the defendants with such duty. The plaintiff was not in the employ of the defendants. The staging in use was apparently that of the plaintiff's employer, but clearly it was under the direction of, and moved about by, such employer or his workmen, including the plaintiff, as required for their work. *The opening in the floors was of itself notice that the elevator was liable to come up there."*

If the opening in the floor where the elevator operates is sufficient notice that the elevator is likely to come up we submit that the presence of the guides or uprights which constituted the track of the counterweight was of itself sufficient notice to an experienced millwright that that track was built to

use and that the counterweight would sometime run thereon. And again if, as in the case last above cited, the opening in the floor was sufficient notice that the elevator would be operated, then in the case at bar where the Defendant in Error had been in the employ of the Plaintiff in Error for many years as a millwright, where his work took him all over the plant and not around any specific location, machine or appliance, and where, as he admits, and as one of his own witnesses also testified, he knew that the counterweight had broken from the cable; that it had been repaired and when he admits that the usual and ordinary and proper way to make the repair was to take a wind off the drum, which would naturally lengthen the cable and permit the weight to come lower, and when he admits that the guides were in plain sight and that he deliberately went and stood between them under this seventeen hundred pound weight, we fail to see wherein defendant in error had brought to this court a case where he was entitled to any warning.

Can this court say that any employer under the conditions shown by this record and as hereinabove recited would anticipate for a second that this man would place himself under that counterweight? Assume that Defendant in Error is correct when he says he was ordered to go under the wharf. It was a general order. He was not under any necessity of haste, was not directed to go any certain route

or in any certain manner to take the measure. He testified that when the order was given he did not know how to go under the wharf, and that he made no inquiry how to do so.

It certainly then became incumbent upon him in the exercise of the most ordinary care for his own safety to inquire how he should get under the wharf. He asked no one; he chose his own route and confessedly for his own convenience; he says it was muddy under the whole of the packing house and that by going through between these guides he could save himself a walk of from 15 to 20 feet extra; he knew that the whole space under the packing house was absolutely safe outside of the place he chose; he knew it was a dangerous place; he knew there was a changed condition and we submit that he deliberately placed himself knowingly and willfully between the two uprights which constituted the track in which the counterweight weighing seventeen hundred pounds operated; that he willfully assumed the risk and was guilty of the grossest negligence and we, therefore, urge that the judgment of the learned trial court be reversed and that this cause be dismissed or remanded to the lower court for a new trial.

Respectfully submitted,

JOHN D. FLETCHER,

ROBERT E. EVANS,

*Attorneys for Plaintiff in Error,*

909 Fidelity Bldg.,

Tacoma, Washington.

C. F. WILT,

*Of Counsel for Plaintiff in Error.*





No. \_\_\_\_\_

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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CARSTENS PACKING COMPANY, a  
corporation,

*Plaintiff in Error,*

VS.

LOUIS GODO,

*Defendant in Error.*

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UPON WRIT OF ERROR FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION.

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**Brief of Defendant in Error**

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## STATEMENT.

The plaintiff in error, hereinafter called Company, owned and operated for the last several years, a large meat packing institution on the tide

flats in the city of Tacoma. The defendant in error, hereinafter called Godo, for convenience sake, had been in the employ of the Company off and on since about 1904 as a carpenter and millwright. The Company had for a number of years a glue house as a part of its plant where it manufactured commercial glue out of the different materials in its packing plant. This house was built upon piling over the tide flats, and the roadways and walks around the plant were also built upon piling like a wharf and in the evidence is called wharf. The filth and stuff from the glue or otherwise had accumulated under the building so that at the time of the accident and for a long time before, the mud, manure, water and filth varied in depth from ankle deep to hip deep (Rec., 116, 127, 142, 160). Some time before the accident to Godo, the Company was turning the glue house into a "wool-pullery," which needed some changes to be made in the building and additional appliances installed. The building had in the northwest corner (before the new addition was put on), an elevator for the purpose of taking material to the different floors above. The counterweights of the elevator were located immediately to the south of the elevator well and ran up and down through the partition on the west side of the building, upon guides. This elevator was installed in about 1906. The counter balance weights weighed about 1700 pounds, and up to the time of the breaking of the cable, hereinafter described, the

bottom of the weights came down to within six or seven inches of the first floor of the building. The guides to the weights extended down through the floor and about to the joist which rested upon the mud flat (Rec., 63, 64, 139). Godo was familiar with the fact that the weights did not pass through the floor of the building, because in 1906, after the elevator had been installed, he boarded up the weight shaft from the first floor up to the second floor (Rec., 64, 65). Between the 15th and 20th day of April, 1911, the Company undertook to place in the building a wringer, and it became necessary to build a cement foundation down in the mud. This foundation was located a few feet to the southeast of the space where the counter balance weights would pass if projecting down through the floor of the building. Godo and another millwright were instructed to go down and build the forms for the concrete foundation. Before they could go to work, it was necessary for the laborers to dip out of the place or pit where the foundation forms were to be placed, the filth, water and mud, which was done by the laborers pouring the same into a trough made out of 1x12 boards and which extended from the wringer foundation place through and between the two guides extending down through the floor, and the water and filth was poured through this trough out to the west of the elevator shaft (Rec., 65, 66, 67, 81, 87). While the men were clearing the pit, Godo and his partner at work, sat on the trough about half an

hour (Rec., 86). The elevator went up and down during that time (Rec., 88), but the weights did not come down below the floor (Rec., 86). If it had, it would have crushed the box (Rec., 90). At that time the Company had not yet commenced the addition to the glue house (Rec., 189). At the time of making the foundation for the wringer there was a platform on the west side of the building which extended up from the wharf about three feet and in order to get under the building the man went through a door about twenty-five feet to the south of the northwest corner of the building. During the latter part of April or the first part of May, just before the commencement of the work of erecting the new addition by the Company, which is shown on Exhibit "A" to the west of the old building (Rec., 18, 145, 147, 149, 150), the cable to the counter-balance weights broke about six inches from the eye and the weights went down through the floor, breaking the cross piece or mud sill and burying all but a small portion of the weights in the mud. When the men went in to repair the cable, they had to put planks on the mud on both sides of the weights in order to do the work necessary to raise the weights out of the mud. These planks were left there so that they made a sort of walk through the space where Godo got hurt (Rec., 142-43). At that place it was between three and four feet from the floor or joist upon which the floor rested to the mud (Rec., 143). A person in a stooping position could pass through



between the guides and where the weights come down and passed into the mud (Rec., 143). In making the repair they took one wrap of the cable from off the drum, which made the line about 94 inches longer, and with the amount broken off and the amount of line necessary to make the wrap through the eye and tie taken off, the 94 inches produced the weights down through the floor to within six or seven inches of the mud sill instead of at the level of the floor as before (Rec., 186-87). Soon after the repair of the cable, the Company proceeded to tear away the platform to the west of the building and built on the addition which is shown in Exhibit "A." This addition extends about thirty feet to the west of the main building and at the time of the accident in order to get under the main building, one would have to crawl through the space on the north side of the new addition and just to the west of the elevator shaft or crawl the length of the new building on his hands and knees as the new addition extended out over the wharf. Peter Cornils was the master mechanic in charge of the work of repairing the cable (Rec., 19 and 67). On the 27th of May, the Company wanted to instal a vat immediately to the north of the building and a few feet to the east of the elevator shaft. Master Mechanic Cornils ordered Godo "to go down under the wharf and take the measurements for that tank" (Rec., 67, 68, 69, 70, 156, 95). Godo wanted to take up one of the planks at the place where the tank was



to be placed and Cornils would not let him do so, telling him: "If Tom (Mr. Carstens) sees you pulling up the wharf, he will give you hell" (Rec., 96, 97, 98, 99). Godo thought he had to do as he was told (Rec., 97).

Godo procured a hammer and chisel to cut a hole in the partition and a 20 foot stick to make the measurements with; and also a candle and some matches to produce a light as it was dark where he would have to work (Rec., 67, 70 inc. and 102). In order to go to the place for measurement, it was necessary for him to crawl under the new addition through the place at the north end of it and just to the east of the elevator well, and as the sill of the wharf at that place was within 6 or 7 inches of the mud flat he was compelled to pass around to the south of the elevator well over to the east of the elevator well at the place where he was to take the measurements. He called his helper and they started to crawl under the addition, Godo leading the way. When Godo got to the opening where the counter-weights came down, he noticed the broken sill and he stopped to investigate what was the matter, whether or not it was safe for him to go under the building. He did not know what had happened down there since he was there at the time of constructing the forms for the wringer foundation (Rec., 110, 112). The counter-weights were up. He stopped at the opening in a crouching position on one of the planks which had been left by the other men, struck a

match so that he could see the conditions under the building, and while in that act, the counter-weights came down, crushing him nigh unto death and injuring him for life. There was nothing to indicate that the weights came down (Rec., 106-7). He never saw the weights come below the floor (Rec., 105). While he knew that the cable broke, and had been repaired (Rec., 83), he did not know that they had lengthened the line or cable in making the repairs, and of course was not warned of the change or the danger of the place (Rec., 107). There were planks nailed to the joists or posts to the south of the space where the weights traveled, which required going south fifteen feet through the manure, filth and slush, to go around the open space where the weights traveled and where Godo undertook to go through (Rec., 93, 94, 134). Beyond that fifteen feet it was open, "But my God, the dirt there was there to crawl through. A man has to go on his knees. He wants to go the shortest route he can" (Rec., 94). There is no evidence that Godo knew that the cable broke off close to the eye, or only a few inches of the cable was broken off. There is no evidence of any existing condition at the time of the accident that would suggest to Godo that the weights went below the floor. The evidence is that at the time of the accident he was taking care of himself, by inspecting the place, by trying to keep out of the filth without the least suspicion of the danger from the weights. Judge Cushman clearly stated the facts

and the law at the close of plaintiff's case (Rec., 171 to 174 inc.).

The Company's petition for new trial states the causes upon which it relied in the language of Rule 74, but no specification of particular error or errors relied upon are made; no specification of the particulars wherein the evidence is claimed to be insufficient as required by the rule.

There are several errors assigned in its assignment of errors but in its brief it waives all except the "insufficiency of the evidence to sustain the verdict."

### ARGUMENT.

This appeal is brought by the Company for the purpose of having this Honorable Court set aside the verdict, and reverse the judgment and dismiss the case solely upon the plea of insufficiency of the evident. But, by way of if-you-don't-succeed-in-that-try-something-else, the Company finally concludes to ask for a new trial. On what, error? Oh, no. Just a new trial, that's all.

In the first instance this Honorable Court will hardly go into the evidence for the purpose of finding out whether there is sufficient evidence to sustain the verdict, and if not dismiss the case. The cause was submitted to the jury and it rendered its verdict in plaintiff's favor and all this Court can do is to ascertain whether or not there is any evidence to sustain the verdict, viewed in the most favorable light for the plaintiff below.

If there is a total lack of evidence the most this Court can do is to grant a new trial, not dismiss the cause.

*Lillian F. Slocum, Executor, vs. N. Y. Life Ins. Co.*, case No. 20, of October term, 1912, decided by U. S. Supreme Court, April 21, 1913, defining the power of Federal Courts and the function of Judge and Jury in the trial of civil cases under the 7th Amendment to the U. S. Constitution, in part as follows:

“The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. \* \* \* One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.” And then coming to the clause, “and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law,” he continued (pp. 447,



448): "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings."

In *Walker v. New Mexico etc. Railroad Co.*, 165 U. S. 593, 596, decided in 1897, where the amendment was again under consideration, it was said by this Court, speaking through Mr. Justice Brewer: "Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative  
\* \* \* Now a general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict. The power of the court to grant a new trial if in its judgment the jury have misinterpreted the instructions as to the rules of law or misapplied them is unquestioned, as also when it



appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact. \* \* \*

In *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, decided in 1899, the subject was much considered, and, following a careful review of the prior decisions, it was said by Mr. Justice Gray, who spoke for the court: It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the Court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one

ordered to go under the wharf to take the measurements.

Sixth: That when he got under the building (new addition) he found he could not get under the wharf at the place he crawled under the building, and it was necessary for him to go under the wharf or to make the measurements under the wharf, to go around to the east of the elevator shaft and cut a hole through the plank at the place where the tank was to be put in.

Seventh: That in order to go around to the east side of the elevator shaft and not go through the space where the weights passed up and down, it was necessary for him to go some fifteen feet to the south, around the planking; that the filth was from ankle deep to hip deep and to go around the planking, one would be compelled to crawl on his hands and knees through that filth.

Eighth: That there was nothing present to indicate to Godo that the counter-weights came below the floor, or were liable to come below the floor at the time he went to pass through to the east of the elevator shaft; that due to the broken plank, he was investigating as to the conditions of the place below the floor of the building to see what was the matter.

Ninth: That nothing was done by the master mechanic to give Godo any knowledge or intimation of the fact that the counter-weights were then passing up and through the space below the floor.

Under these statement of facts there were only three questions to be submitted to the jury:

First: Did the Company provide Godo with a reasonably safe place in which to do his work; this point involves the question of notifying Godo of that danger created by the Company in their change and repair of the elevator?

Second: Did Godo assume the risk of the dangers from being struck by the counter-weight while passing through the space?

Third: Was Godo guilty of contributory negligence in not going through the mire and filth around the planking and in attempting to go through the space where the weights came down?

All of these questions were properly submitted to the jury by the trial court. Every phase of the theory of the Company was put up to the jury for them to decide, and upon every phase of the case there was a conflict of testimony and it was the province of the jury to determine. They have and must have decided the facts as above outlined. The Company presents nothing but an argument on points of fact and issue. Where there is a conflict of testimony this Honorable Court, with all of the Courts, has held that a new trial will not be granted.

The rule of safe place needs no citation of authorities. It is very well crystalized and understood, as said by this Honorable Court in *Mining*

*Co. v. Jones*, 130 Fed. ~~821~~<sup>813</sup>, and many other cases too numerous to mention.

It may not be negligent for the Company to have the weights run down beneath the floor, but if the weights are running through a space where men, using ordinary care and without knowledge of the fact of the danger, are wont to go, then the Company has not fulfilled its positive duty to its workmen, in allowing them in their course of employment to go through that place in ignorance of the danger, or permitting the place to exist to the injury of the workmen, when by reasonable care they could have provided against the danger. Now, in this case the Company could have provided against the danger in two ways : By informing Godo of the fact that since the repairs, the weight came beneath the floor, or by boarding up the space as they ultimately did. In other words, according to the long line of decisions, unnecessary to cite, was there a danger which reasonable caution could have prevented, and which the workmen did know? Under all of the facts of the case, this was a question for the jury, and evidence being adduced, sufficient to sustain the finding of the jury, that there was a danger which could have been averted, we submit that the citations of all of the authorities is unnecessary. Chapter 23 of Labatt has been cited by the Company and the synopsis of many cases have been printed in the brief bearing on the question of obeying direct orders. In nearly all



of these cases the danger was known, but disputed as between the master and the workman, and in no well considered case will you find any deviation of the rule of safe place where the workman is ordered into a place to work, which has been made dangerous through the acts of the employer. It is negligence in not providing a reasonable safe place, and the question of assumption of risk and contributory negligence do not make it less negligent on the part of the employer but tends to relieve the employer from liability. The point where the question of ordering Godo into this place, is through the fact that this was not Godo's regular place of work and he was ordered down in this place to perform a special, peculiar, piece of work, and he had a right to assume that there were no more dangers than what he could see or knew of; and if the Company had created a danger, unknown to him, it was the positive duty of the Company to inform him of that danger or have the conditions such, that there would be no danger.

*Mitchell vs. Ry.*, 197 Fed. 528. Mitchell was killed while carrying a door across a railroad track and while resting on the railroad track with the big door, a train unknown to him collided with the door and killed him. The question as to assumption of risk was certainly for the jury. It is not enough that you can suspect that someone might have discovered the danger. The question is, did Godo know. This is especially so under the recent ruling of this Honorable Court in *Williams vs.*



*Mining Co.*, 200 Fed. 211. Williams was injured through coming in contact with a wire carrying 500 voltage in a mine. He did not know of the high voltage, but knew that he might get "stung." I take it that the above case is somewhat stronger against the workman than the case at bar.

Was Godo guilty of contributory negligence in not going on his hands and knees through the filth and mire around the plank to the south of the weights instead of going through the open space in a more direct route? That involves, of course, the question, to a certain extent, as to whether or not Godo knew of the danger from the counterweights. This also involves the question as to the duty of the defendant Company in informing Godo or making the place reasonably safe. The Court remarked in denying the motion for directed verdict, that it seems very funny that the Company would require men to crawl on their hands and knees through filth a distance of fifteen feet, when there is no evidence of any knowledge on the part of Godo of the necessity of enduring such conditions any longer than possible.

"Whether a reasonable prudent person would have taken the safe way may depend upon the situation and the circumstances, the accessibility and the proximity of the safe way, the difficulties and obstructions to the use of the safe way,"

are questions to be decided under all the evidence

in the case. *Great Northern Ry. v. Thompson*, 199 Fed. 395.

I take it that under all of the decisions of this Honorable Court and of the Courts at large, there is no law question in this case. Every question was a jury question and there can be no error in the submission of such questions and the judgment should be affirmed.

Respectfully submitted,

GOVNOR TEATS,  
HUGO METZLER,  
LEO TEATS,  
RALPH TEATS,

Attorneys for Defendant in Error.



# In the United States Circuit Court of Appeals for the Ninth Circuit

---

CARSTENS PACKING COMPANY,

A Corporation,

*Plaintiff in Error,*

vs.

LOUIS GODO,

*Defendant in Error.*

No. \_\_\_\_\_

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## Reply Brief of Plaintiff in Error

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Upon writ of error from the United States District Court for the Western District of Washington, Southern Division.

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### REPLY ARGUMENT

On account of inaccurate and misleading statements in the brief of defendant in error we deem it not out of place to file a short reply thereto.

Many of the statements found in the statement of the case by defendant in error are not supported by the record.

I. It is asserted "the guides to the weights extended down through the floor and about to the joists which rested upon the mud flat."

The record shows that at all times and to the knowledge of Godo these guides for the counterweights to travel in "ran clear down in the mud," (Godo's testimony, Record, page 107) and hence Godo knew that the construction contemplated the operation of the counterweights to the mud.

II. It is asserted "these planks (used by the men in repairing the cable) were left there so that they made a sort of walk through the space where Godo got hurt."

To support this statement counsel refers to Record, pages 142-143, but there is nothing of this kind to be found at this reference or elsewhere in the testimony.

The testimony is that in doing the work the men put down planks to stand on, but there is not a syllable of testimony from Godo or any one that these planks were there when Godo was hurt, but, on the contrary, Godo testifies that he knew of no work having been done under there. (Record, page 95.) That he had never been under there and knew of no one that had and knew of no occasion for any one to go under there. (Record, page 96.) And his helper, Nels Olson, testified that it was muddy all under the building; that he knew of no one going under where he and Godo went and that the place under the coun-



terweights did not have the appearance of any one having been there. (Record, pages 127-128.) There is no foundation in the record for counsel's statement or theory of a walk-way; there was certainly nothing to invite Godo to use that way as will clearly appear by reading the testimony of Godo and his helper, Nels Olson.

III. It is asserted that it was dark where Godo would have to work.

It is no doubt true that back under the building where Godo intended to cut through the foundation it was dark, but the court should not infer from counsel's statement that it was dark under the counterweights, for Godo testified to the contrary. He testified that it was daylight; that he could see the place where the counterweights ran; could see the lead taps and knew that it was the counterweight track and could see the space ahead (Record, page 101); that he was lighting his candle to see the space beyond the counterweights and to examine a broken joist under the counterweights. (Record, page 112.) He stooped under a 1700-pound weight operating overhead, through a track that ran down to the mud, to light his candle.

There was sufficient light to observe the general surroundings, the counterweight space and track through which the counterweight operated, but it was dark ahead. Godo certainly selected a rather unfortunate place under this 1700-pound

weight to stand while lighting his candle for his further journey!

He was not invited to stop there; was not invited to pass through this space; was not even invited to go under the building. He was told to get a measure from the building to the next cap outside of the building where a vat was to be let into the wharf, and as he says was directed to go under the *wharf* for that purpose. (Record, page 91.)

It was not known that he was going under the building, much less that he would attempt to pass under the counterweights and to stop under there to light his candle; nor was it known that he was going to provide himself with a candle or to attempt to cut a hole through the foundation of the building to stick a pole through. He chose his own route and method and made no inquiry. (Record, page 95.)

IV. It is asserted "when Godo got to the opening where the counterweights came down he noticed the broken sill and he stopped to investigate what was the matter, whether or not it was safe for him to go under the *building*. He did not know what had happened down there since he was there at the time of the construction of the forms for the wringer foundation." A fairer statement would have been that Godo knew the entire under part of the building was open; that he went under the counterweight knowing the weights were operating above him;

that he stopped under these weights to light a candle; that he knew that the counterweight cable had previously broken. He could see that the track extended to the mud. He could see the broken mud sill crushed by a previous fall of these weights, falling through the space he selected to stop. Knew the cable had been repaired and knew that the way to repair the cable was to take a wind off the drum and reattach the cable and that in all probability it would allow the weights to drop further. (Record pages 107-108-109-110-111)

V. It is asserted "while he knew the cable broke and had been repaired he did not know that they had lengthened the line or cable in making the repairs. \*\*\*\*\*There is no evidence that Godo knew that the cable broke off close to the eye or only a few inches of the cable was broken off. There is no evidence of any existing condition at the time of the accident that would suggest to Godo that the weights went below the floor."

It would seem that knowing the cable had broken and knowing from his experience as a millwright that the proper and usual way to repair the same was to take a wind off the drum and reattach the cable to the counterweight which would, in the ordinary operations, lengthen the cable and allow the counterweights to come further down, that Godo was not exercising much precaution when he stood under this heavy weight, without knowledge as

counsel argues whether or not this cable had been lengthened in making such repairs. The guides were there for such lengthening and for use of the counterweights if the cable should be lengthened. Knowing these things Godo should not shut his eyes and stand under this weight without knowing or inquiring the nature of the change in view of the fact that he knew a change had been made and knew the proper and usual method of making such change and further knowing that no one knew he was going under the building or was going near these weights.

It is now, for the first time, argued that the negligence of the master consisted in not furnishing Godo with a safe place in which to work.

This is not the negligence alleged in the complaint.

The master did not direct Godo to this place; did not know that he was going there. No one had used this space as a passageway and no one expected it to be so used. Godo had no work there to perform so far as the master had any knowledge. It was not a place of work or a passageway, the entire under part of the building was open, but the master had no knowledge even that Godo was going under the building.

It is now argued that it was negligence in the master to allow these weights to operate through a space where employes *are wont to go* without either warning the employes of such operation or boarding



up this space where employes *were wont to go*. There is no evidence that this was a space where employes *were wont to go* or where any employe had ever before this time gone. So far as negligence is charged for failure to board up this space, we reply that no such negligence is charged in the complaint.

So far as negligence is charged in failing to warn Godo we reply that it was not known that Godo would go under the building, much less attempt to pass under these weights, besides Godo knew that the space was open. He also knew the counter-weights operated above this space; knew that they had broken once and had fallen through this space and crushed the mud sill; knew that they had been repaired and that the usual and proper method of repairing would ordinarily result in lengthening the cable.

Godo knew of the change, knew that he was going under the building, which fact the master did not know, then if Godo did not know the nature of the change in the weights he should have inquired. But he evidently did not think an inquiry necessary nor did the master deem a warning necessary regarding a danger the master had no knowledge that Godo would encounter. Godo was an experienced mill wright; knew of the change and the usual and proper method of making it.

We will briefly review the cases cited by counsel for defendant in error.



The first case he cites, *Lillian F. Slocum, executor, vs. New York Life Insurance Company*, Case No. 20, October, 1912, United States Supreme Court April 21, 1913, is one wherein the court holds that where there is evidence to sustain the verdict the court should not usurp the functions of the jury. But so far as counsel quotes from the case in his brief we fail to find any intimation that the Supreme Court of the United States has held that where there is a total failure of proof of negligence the court should not direct a judgment. When the facts are undisputed their legal sufficiency becomes a question of law for the court, and this has always been the rule. If plaintiff brought suit to recover a debt and failed to introduce any evidence of the debt it would certainly be the duty of the court to direct a verdict and if the lower court did not do it, it certainly would be the duty of the appellate court to direct a verdict or to grant a non-suit as the case might be. The proposition in the case at bar is, as we read the record, from the evidence of the defendant in error himself, that no negligence whatsoever on the part of the master was proven.

The next case cited by defendant in error is *Bunker Hill & Sullivan Mining Co. vs. Jones*, 130 Fed. 813. In that case a miner was sent to a specific place to do a specific work and the rock above him had not been properly timbered and fell on him. It was the duty of the master to protect this roof and

the court held that when the defendant sent its servant into that place to work and failed to perform that duty it was guilty of negligence; that there was no duty upon the servant to inspect that which did not come within his line of work to see if the master had performed his duty. In the opinion at *page* 818 the court says:

“\*\*\*\*\*The shift boss, whose orders he was obliged to obey, indicated the place in which he was to work; directed the number of holes to be drilled in the breast of the tunnel and that the blast should be fired at noon. He entered upon the performance of his duties and was warranted in the assumption that the necessary precautions had been taken by the defendant to prevent the caving and falling of rock from the stope above. As was said by the court in *Railway Company vs. Jarvi*, *supra*, comparing the relative duty of master and servant;

‘Of the master is required care and diligence in the preparation and subsequent inspection of such a place as a room in a mine that is not, in the first instance, demanded of the servant. The former must watch, inspect, and care for the stopes through which the servants work, as a person charged with the duty of keeping them reasonably safe would do. The latter has a right to presume, when directed to work in a particular place, that the master has performed his duty, and to proceed with his work in reliance upon this assumption, unless a reasonably

prudent and intelligent man, in the performance of his work as a miner, would have learned facts from which he would have apprehended danger to himself."

Again in the same opinion at *page* 819 quoting from *Kelly vs. Mining Company*, 41 Pacific, the court says:

"\*\*\*\*\*Sheean (the foreman) was not working in the mine with plaintiff. The plaintiff was not engaged in creating a place on his own judgment and at his own risk."

This case clearly is one where the master selected the place the servant was to work and was under a positive duty to make it reasonably safe and certainly has no application to the facts of the case at bar.

The next case cited by defendant in error, *Mitchell vs. Toledo St. L. & W. R. Co.*, 197 Fed. 528, in that case plaintiff was sent to assist in replacing a door on a car which car stood on one of a number of side tracks, apparently among a maze of side tracks and repair tracks. Two men were carrying this large door. When they had the door about a car's length from the car upon which they were to work an engine was sent in and bumped the cars and plaintiff was thrown under the wheels and killed. It was held the Company was negligent in sending him to this place to work and then make it suddenly dangerous.

The next case cited by defendant in error is *Williams vs. Bunker Hill & Sullivan M. & C. Co.* 200 Fed, 211. In that case the court in discussing the proposition where the plaintiff admitted he knew that he might get stung by the electric wire says:

“\*\*\*\*\*We might say here that there was knowledge of the danger yet no actual appreciation of the risk to which Williams was exposed, that is he knew of the danger by the exposed wire but he did not know of the risk of his action in touching it with a hose in his hand—in other words he did not appreciate the perils that surrounded him.”

So also in this last cited case the plaintiff was sent to a specific place to work.

In the last case cited by defendant in error, *Great Northern Ry Co. vs. Thompson*, 199 Fed. 395, the Railway Company had posted “no trespass” signs but had never enforced the rule against trespassing and knew that people were in the habit of crossing their tracks as a common travel way. A caboose was backed in on the track in the night time without lights or warning, the Company knowing that people were in the habit of going on these tracks as a common passageway. Held that plaintiff was entitled to recover for the negligence of the Company.

As we stated in our opening brief, the law requiring a warning to employes has grown up from and nearly every decided case is one where the employe was directed by the master to go to a specific



place which was dangerous or where the mechanical appliances, or the specific location where the servant was employed had been changed and made dangerous and the danger was not open and apparent to ordinary observation. These cases can surely have no application to the case at bar. The defendant in error testifies, as has been heretofore set out, that he was ordered *to go under the wharf*; that the wharf was outside of the building; that the foundation of the building extended clear down to the mud flats; that it was inconvenient and muddy to get under the wharf and finally he testifies that he didn't know how to get under the wharf. He didn't tell anybody, nor ask how to get there. He simply went and got a pole and a chisel and crawled, not under the wharf, but under the building. Surely if we take the order as the defendant in error swears to it, that he was ordered to go under the wharf, knowledge that he was going under the building cannot be imputed to the plaintiff in error. And furthermore there is nothing in this record to show that the master mechanic, or any one in authority, knew or had any idea that Godo was going under the building. He chose his own time, method and route. He knew the counterweights operated in the uprights or guides and it was so light that he could see the lead taps, as he called them, or counterweight uprights or guides. He knew the counterweight weighed 1700 pounds. He knew that previous to his going under there the



cable had broken. He knew that it had been repaired. He knew that some change had been made; he knew that it was a dangerous place; he knew that it was the only dangerous place under that building. He is a millwright and had worked around this very plant for many years. The very men who made the repairs on the cable and effected the change which permitted the counterweight to come lower were in the same crew and under the same foreman as Godo and testified that Godo knew the cable had broken and been Repaired. And we submit that even if Godo had been ordered to go under that building there was nothing to suggest to the master that a warning was necessary to this man of mature years and wide experiences as a millwright around this identical plant; but when he was not ordered under the building; when no one in authority knew he was going under the building, certainly there was no duty imposed upon the plaintiff in error to warn him not to go under the counterweights. We submit that there was no evidence of negligence on the part of plaintiff in error in the record and that this cause should be reversed and remanded to the lower court with direction that the same be dismissed or a new trial granted.

Respectfully submitted,

JOHN D. FLETCHER,

ROBERT E. EVANS,

*Attorneys for Plaintiff in Error*

909 Fidelity Building Tacoma, Washington

C. F. WILT *Of Counsel for Plaintiff in Error*



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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R. H. HERRON COMPANY, a Corporation,  
Appellant,

vs.

WILLIAM H. MOORE, Jr., Trustee in Bankruptcy of  
the CLEVELAND OIL COMPANY, a Corporation,  
Bankrupt,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the  
Southern District of California, Southern Division.

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FILED

APR 11 1913



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Citation.]

*In the District Court of the United States, Southern  
District of California, Southern Division.*

No. 686.

In the Matter of THE CLEVELAND OIL COM-  
PANY, a Corporation,

Bankrupt.

To William H. Moore, Jr., Trustee in Bankruptcy  
of the said Bankrupt, Cleveland Oil Company,  
a Corporation:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Ninth Circuit, at the city of San Francisco, in the State of California, on the 28th day of February, 1913, pursuant to an appeal allowed and filed in the clerk's office of the District Court of the United States, Southern District of California, Southern Division, wherein R. H. Herron Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable OLIN WELLBORN,  
Judge of the District Court of the United States,  
Southern District of California, Southern Division,  
this 30th day of January, A. D. 1913.

OLIN WELLBORN,  
Judge of the District Court of the United States,  
Southern District of California, Southern Division. [5\*]

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\*Page-number appearing at foot of page of original certified Record.

[Endorsed]: No. 686. In the United States District Court, Southern District of California, Southern Division. In the Matter of the Cleveland Oil Company, a Corporation, Bankrupt. Citation. Filed Jan. 30, 1913. Wm. M. Van Dyke, Clerk. Virgil W. Owen, Deputy.

Received a copy of the within Citation 30 day of January, 1913.

HICKCOX & CRENSHAW,  
Attorneys for Trustee. [6]

---

**Names and Addresses of Attorneys.**

For R. H. HERRON COMPANY:

GEO. E. WHITAKER, Esq., Stoner Block,  
Bakersfield, California.

For WM. H. MOORE, Jr., Trustee in Bankruptcy:

HICKCOX & CRENSHAW, H. W. Hellman  
Building, Los Angeles, California. [7]

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**[Certificate and Report of Referee in Bankruptcy.]**

*In the District Court of the United States of the  
Southern District of California, Southern Division.*

IN BANKRUPTCY—No. 686.

In the Matter of CLEVELAND OIL COMPANY, a  
Corporation,

Bankrupt.

To the Hon. OLIN WELLBORN, Judge of said  
Court:

I, Lynn Helm, Referee in Bankruptcy, in charge

of these proceedings, do hereby certify:

That in the course of said proceedings on the 22d day of May, 1911, the R. H. Herron & Company filed a proof of debt for the sum of \$14,808.32, founded upon four certain promissory notes made by said bankrupt attached to said claim and due respectively August 21, September 10, October 24, and November 15, 1910, and upon an open account for goods, wares and merchandise amounting to the balance of \$6,376.53, which proof of claim is returned herewith, together with an itemized account of said open account filed with said proof of claim on the 22d day of May, 1911.

That on the 23d day of August, 1911, William H. Moore, Jr., the duly elected and qualified trustee herein, filed objections to said claim of R. H. Herron & Company, which said objections are returned herewith. That afterwards said objections to said proof of claim came on to be heard, and after hearing the evidence produced on behalf of said claimant and said trustee in bankruptcy, the following order was made and entered on the 3d day of October, 1912:  
[9]

*“In the District Court of the United States for  
Southern District of California, Southern Division.*

IN BANKRUPTCY—No. 686.

In the Matter of CLEVELAND OIL COMPANY,  
a Corporation,

Bankrupt.

**Decree.**

WHEREAS an involuntary petition in bankruptcy was on the 12th day of January, 1911, filed against the above-entitled bankrupt, Cleveland Oil Company, a corporation, and said corporation was thereafter, to wit, on the 20th day of February, 1911, duly adjudicated a bankrupt upon said petition; and,

WHEREAS, R. H. HERRON & COMPANY did, after said adjudication, file a claim in the above-entitled estate for the sum of Fourteen Thousand Eight Hundred and Four Dollars and Thirty-two Cents (\$14,804.32), consisting of an open account for goods, wares and merchandise sold and delivered by said claimant to said bankrupt, amounting to Six Thousand Three Hundred and Seventy-six Dollars and Fifty-three Cents (\$6376.53), and the balance of principal and interest of Eight Thousand Four Hundred and Twenty-seven Dollars and Seventy-nine Cents (\$8427.79), as evidenced by four promissory notes made by said bankrupt, attached to said claim, and due respectively August 21, September 10, October 24, and November 15, 1910; and,

WHEREAS, the trustee in the above-entitled estate filed objections to said claim, and basing his objections upon the ground that said R. H. Herron & Company had received preferences from said bankrupt, and an order having been made herein that a hearing be had upon said claim, and said [10] objections on the 25th day of July, 1912, and due notice of said hearing having been given to said claimant and to said trustee, and said claimant having appeared by

counsel on said day, and testimony having been taken thereon, and after hearing L. O. Crenshaw, attorney for the trustee in support of said objections, and George E. Whitaker in opposition thereto, and the issues having been submitted on the 25th day of July, 1912, and the referee having heretofore rendered an opinion herein, which said opinion is on file, and it appearing to the satisfaction of the Court from the evidence, the Court finds:

That the above-mentioned bankrupt, Cleveland Oil Company, was on the 15th day of September, 1910, and prior thereto, insolvent, and was on the 31st day of October, 1910, and prior thereto, insolvent, and was on the 31st day of December, 1910, and prior thereto, insolvent.

That on the 15th day of September, 1910, which said day was within four months before the filing of the petition in bankruptcy herein, the said Cleveland Oil Company did pay and transfer to said R. H. Herron & Company the sum of Two Thousand Dollars (\$2000.00) in cash to apply upon a pre-existing debt which said bankrupt owed to said claimant.

That on the 31st day of October, 1910, which day was within four months before the filing of the petition in bankruptcy herein, the said Cleveland Oil Company did pay and transfer to the claimant R. H. Herron & Company certain oil well casing of the value of Two Thousand Eight Hundred and Twenty-three Dollars and Thirty-seven Cents (\$2823.37), said transfer to apply upon a pre-existing debt owed by said bankrupt to said creditor.

That on the 31st day of December, 1910, which said



day was within four months before the filing of the petition in bankruptcy herein, said Cleveland Oil Company did pay and transfer to the claimant R. H. Herron & Company two pumps, [11] of the reasonable value of Three Hundred Dollars (\$300.00), to apply upon a pre-existing debt owed by said bankrupt to said claimant.

That on the 15th day of September, 1910, and on the 31st day of October, 1910, and on the 31st day of December, 1910, and at the time said transfers were made, said R. H. Herron & Company was a creditor of said Cleveland Oil Company. That by said transfers made on said 15th day of September, 1910, on said 31st day of October, 1910, and on said 31st day of December, 1910, and by each of them, said Cleveland Oil Company intended to give said R. H. Herron & Company a preference. That the effect of said transfer made on the 15th day of September, 1910, said transfer made on the 31st day of October, 1910, and said transfer made on the 31st day of December, 1910, to the said R. H. Herron & Company, will enable said R. H. Herron & Company to obtain a greater percentage of its debt than any other of the creditors of the Cleveland Oil Company of the same class. That said bankrupt having intended to give preference as aforesaid the said R. H. Herron & Company at the time of receiving said payment on the 15th day of September, 1910, on the 31st day of October, 1910, and on the 31st day of December, 1910, and at each of said times, had reasonable cause to believe that it was intended thereby to give a preference.

As a conclusion of law from the foregoing, the Court finds that by reason of the law and the facts, the said transfer made on the 15th day of September, 1910, and the said transfer made on the said 31st day of October, 1910, and the said transfer made on the said 31st day of December, 1910, and each of them, was and were intended to be and was and were a preference, and that the objections of the trustee of said claim of R. H. Herron & Company should be sustained, and the [12] said claim should be disallowed, and that said claim should not be allowed unless said creditor R. H. Herron & Company shall surrender such preference.

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that said claim of R. H. Herron & Company, for the sum of Fourteen Thousand Eight Hundred and Four Dollars and Thirty-two Cents (\$14,804.32) be not allowed, unless said claimant shall surrender and pay to the trustee herein the sum of Five Thousand One Hundred and Twenty-three Dollars and Thirty-seven Cents (\$5,123.37), paid to it as a preference, together with interest on the sum of Two Thousand Dollars (\$2,000), at the rate of 7% per annum from the 15th day of September, 1910; interest on the sum of Two Thousand Eight Hundred and Twenty-three Dollars and Thirty-seven Cents (\$2,823.37), at the rate of 7% per annum from the 31st day of October, 1910, and interest on the sum of Three Hundred Dollars (\$300.00) at the rate of 7% per annum

from the 31st day of December, 1910.

Dated this 3d day of October, 1912.

LYNN HELM,  
Referee in Bankruptcy."

That on the 12th day of October, 1912, the said R. H. Herron & Company, feeling aggrieved with said order last aforesaid, filed a petition for review which was granted, and which is returned herewith.

That a summary of the evidence upon which said order was based, and my reasons for making said order, is found in the opinion which I filed upon the hearing of said claim on the first day of October, 1912, which opinion is as follows: [13]

That the questions presented on this review are, whether said order made by me on October 3, 1912, was correct or whether it was in error as assigned by the claimant in its petition for review.

FIRST: I hand up herewith for the information of the judge the following papers, the reporter's transcript of the testimony taken before me on the hearing of said claim, which with the exhibits hereinafter referred was all the evidence produced by either party before me on said hearing.

SECOND: I return herewith Claimant's Exhibits 1, 2, 3, 4, and Trustee's Exhibits 1, 2, 3, 4, 5, 6, 7.

Respectfully submitted,

LYNN HELM,  
Referee in Bankruptcy.

Dated October 14, 1912. [14]

*In the District Court of the United States, of the  
Southern District of California, Southern Division.*

IN BANKRUPTCY—No. 686.

In the Matter of the CLEVELAND OIL COMPANY, a Corporation,

Bankrupt.

**[Referee's Opinion] upon the Claim of R. H. Herron  
& Co. and the Objections of the Trustee Thereto.**

GEO. E. WHITAKER, Esq., for Claimant.

Messrs. HICKCOX & CRENSHAW, for Wm.  
H. Moore, Jr., Trustee.

HELM, Referee.

Upon proof of debt of the R. H. Herron & Co., for the sum of \$14,804.32, consisting of an open account for goods, wares and merchandise sold and delivered by said claimant to said bankrupt, amounting to \$6,376.53, and the balance of principal and interest of \$8,427.79, as evidenced by four certain promissory notes made by the said bankrupt attached to said claim and due respectively, Aug. 21, Sept. 10, Oct. 24, and Nov. 15, 1910. Objections were filed thereto by Wm. H. Moore, Jr., trustee, to the effect that within four months preceding the filing of the petition in bankruptcy said claimant had received certain payments on account and had accepted certain transfers of property to apply on said account, with reasonable [15] cause for believing that a preference was intended to be given it thereby, and that said claimant had not surren-

dered said property or money so received by it.

The petition in bankruptcy herein was filed in this court on the 12th day of January, 1911, and thereafter on the 20th day of February, 1911, the said Cleveland Oil Company was duly adjudicated bankrupt, and on the 3d day of April, 1911, Wm. H. Moore, Jr., was duly elected trustee of said bankrupt and qualified as such.

At all times within four months preceding the filing of the petition in bankruptcy herein, said bankrupt was insolvent, that is to say, the aggregate of its property, exclusive of any property which it had conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay its creditors, was not at a fair valuation sufficient in amount to pay its debts. The schedule in bankruptcy herein showed that the said bankrupt was at the time of the filing of the petition in bankruptcy indebted on secured claims in the amount of \$103,271.02, and unsecured claims, \$34,234.61. The property which came into the hands of the trustee in bankruptcy, being property held by the bankrupt at the time of the filing of the petition in bankruptcy, did not exceed the sum of \$10,000, and that was entirely from oil that was produced on leases held by the bankrupt.

At the request of the stockholders on the 26th of October, W. P. Mushet, an expert accountant, commenced the examination of the books, accounts and affairs of the company and made a report thereon on the 21st day of November, 1910. The claimant's manager was not advised of this report until he saw



it published in a newspaper December 20, 1910. The report shows that September 30, 1910, the bankrupt's liabilities [16] amounted to \$57,529.06; in addition to this, there was a bonded indebtedness of \$100,000. Its assets consisted of oil properties and leases known as the California Kern, France Midway, the Volcan lease and the York Syndicate. On these there had been expended a large amount of money, but the leases had turned out to be of very doubtful value and went back and were forfeited to the lessees. The office furniture and fixtures cost \$770.92. These, with the exception of oil on hand, which was afterwards sold by the trustee, were all the available assets of the company. The financial condition of the bankrupt was practically the same at all times within four months of the filing of the petition in bankruptcy as it was at the date of said filing.

On the 15th day of September, 1910, and within four months preceding the filing of said petition in bankruptcy herein, the said bankrupt while insolvent, transferred and paid to said claimant, who was then and still is a creditor of said bankrupt, the sum of \$2,000 in cash to apply upon a pre-existing debt the said bankrupt owed to said claimant; afterwards, on the 31st day of October, 1910, said bankrupt, while still insolvent, transferred to said claimant, who was then and still is a creditor of said bankrupt, certain oil well casing of the value of \$2,823.37, the said transfer to apply upon a pre-existing debt owed by said bankrupt to said creditor; and afterwards, on the 31st day of December, 1910, said bankrupt while still insolvent, transferred to said claimant, who was then

and still is a creditor of said bankrupt, two pumps of the reasonable value of \$300 to apply upon the pre-existing debt owed by said bankrupt to said claimant, and the effect of each of said transfers hereinbefore mentioned was to give to said creditor a greater percentage of its claim than to other creditors of the same class. The bankrupt, [17] theretofore being insolvent, must be held to have given a preference to said claimant.

The intent of the debtor, in the absence of other proof, may be shown by its equivalent in law, proof of the inevitable result of the transaction, which in the case at bar was to give a preference and to create an unequal distribution of the bankrupt's estate. The bankrupt at the time of these payments and transfers of its property not only knew that it was insolvent, but it knew that it was so irretrievably so that it could not hope to continue its business without some sort of reorganization, and its officers knew it could not make the payment which it did without disparity in its payments to its other creditors. If the effect of the act was to create a preference, and such was its natural consequence, it must be presumed to have intended to do that which was the necessary result of its act. *Western Tie & Timber Co. vs. Brown*, 196 U. S. 502, 508.

Whether or not said claimant at the time it received said cash and property had reasonable cause to believe by said payment and transfers it was given a preference, is the only other question to be determined in this matter.

The bankrupt, the Cleveland Oil Company, was operating certain oil wells and properties in the Kern River field and in the Midway oil field at the time of the filing of the petition herein, and had been for a period of a year or more prior thereto. Commencing with about the 23d day of February, 1909, the claimant had sold and delivered to said bankrupt a large quantity of goods aggregating over \$20,000. For part of the indebtedness due from the bankrupt to the claimant on account of goods sold, notes had been given, four of which are in evidence herein, dated respectively May 23, May 9, June 9, and July 16, 1910, and aggregated \$12,726.68, which evidenced [18] goods purchased by the bankrupt of the claimant prior to July 1, 1910, and which were not paid for in cash. During July, 1910, goods were sold on open account amounting to \$3,547.23, during August, 1910, \$2,920.76, and during September, 1910, \$65.54, a total of \$6,533.53.

While the bankrupt had been a large purchaser during the months previous to September 1, 1910, claimant on the 21st of September had notified its several stores at Bakersfield, Taft and Maricopa in Kern County, that the bankrupt was only privileged to buy supplies for emergency requirements not exceeding \$50 in any one order, and if they wanted anything in excess of the emergency supplies, it was to be communicated to the Los Angeles office, where was the credit man of the claimant. Prior to that, on July 22, 1910, the managers of the stores of the claimant were advised that the state of the account with the Cleveland Oil Company was such that they

could only deliver goods to the Cleveland Oil Company in small quantities, not exceeding \$100, and anything in excess of that was to be referred to the Los Angeles office. On August 5, one of the managers of the claimant in the oil fields wrote the claimant that he was delivering goods to the Cleveland Oil Company in small quantities almost daily and wanted to be advised when the claimant expected a settlement from the bankrupt; that the amounts were not large, but exceeded the sum of \$100 named in their letter of advice of July 22d. On August 6 the claimant authorized its agents to deliver to the company 11,000 feet of 8 $\frac{1}{4}$  inch No. 28 casing, for the reason that the bankrupt had that day promised them to pay its equivalent in cash, and it then paid claimant \$1,500.

Notwithstanding the reiterated testimony of Mr. Sands, the general manager and treasurer of the claimant and who acted as its credit man, that he did not know, when he received the [19] payment of \$2,000 from the bankrupt on September 15, 1910, or on the 26th day of October, when he authorized his manager to accept a return of certain oil well casing for which credit was given on the 31st of October, or at the time the two pumps were returned November 25, 1910, that the bankrupt was insolvent, and that he had no reason to believe that any preference was intended to be given to the claimant R. H. Herron & Co., the testimony shows that he had reasonable cause to believe that the bankrupt was giving to the claimant a preference.

It was not necessary that the claimant should have



had knowledge that the preference was intended, nor was it necessary that he should believe that a preference was intended; it was only necessary that he should have had a reasonable cause to believe that a preference was intended, which is far different. This exists, according to the accepted doctrine, where the surrounding circumstances were such as to put a person of ordinary business intelligence upon inquiry or to induce the belief that he is given more than other similar creditors. Notice of facts that would incite a man of ordinary prudence to inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose. *In re Eggert*, 102 Fed. 735; *Stuart vs. Farmers-Merchants' Bank of Cuba City (Wis.)*, 21 Am. B. R. 403; *Grant vs. Bank*, 97 U. S. 80; *Bank vs. Cooke*, 95 U. S. 343; *McElvain vs. Hardesty*, 22 Am. B. R. 320; *Wright vs. Sampter*, 18 Am. B. R. 355; *Wright vs. Skinner Manufacturing Co.*, 20 Am. B. R. 527; *In re Goodhile*, 130 Fed. 471; *Sundheim vs. Ridge Avenue Bank*, 15 Am. B. R. 132; *In re Virginia Hardwood Mfg. Co.*, 15 Am. B. R. 135; *In re Dorr*, 196 Fed. 292; *Collier on Bankruptcy*, 9th Ed. 815, and cases cited.

The bankruptcy act has added a new and very serious limitation upon the freedom of business intercourse. Any act, however, in the ordinary course of business, by which a merchant [20] pays a debt is liable to be reviewed and rescinded, if it happens within four months thereafter the debtor becomes bankrupt.

The claimant in the testimony given by its man-



ager and in the letters by it produced upon the hearing has furnished the evidence from which it must be found that the claimant had reasonable cause to believe, when it received the payment made to it and the property transferred to it, from the bankrupt, that it was receiving a preference over other creditors of said bankrupt.

At the time that the oil well casing was delivered by the bankrupt to the claimant, about the last of October, 1910, Mr. Sands, on behalf of the claimant, insisted upon a payment being made upon the account. The claimant had a guarantee from W. A. France, President of said Cleveland Oil Company, that he would be responsible for the account, and Mr. Sands was threatening to call upon him for a payment. He had been at the office of the company two or three times and they had been down to see him, and finally Mr. Edson France, the vice-president of the bankrupt company, and a brother of W. A. France, went down to see Mr. Sands and told Mr. Sands that they did not have any money to pay on account of the notes which were overdue, but that they had some piping and casing which they had bought of the claimant at the oil fields which they would return. Mr. Sands said he would take it and give the bankrupt credit therefor at 75 cents on the dollar for what they paid for it. This was a fair price for second-hand casing in the field. It was not unusual for oil supply dealers to take back at a discount casing which they had sold to oil companies operating in the oil fields. It was quite frequently done and 25% was the usual discount. So far as Edson

France knew, Mr. Sands did not go into the financial condition of the company, and Mr. Sand's own testimony shows that he did not. Mr. Sands, however, wrote [21] October 18, 1910, to his district manager at Taft, as follows: "The Cleveland Oil Company owe us considerable money and they are not in position to supply the ready cash. Their stock is almost worthless from a stock market view, the last sales being passed at  $23\frac{3}{4}$  cents. They are endeavoring to arrange the company on a good financial basis, but that will take some time. They have arranged to deliver us a string of 10" No. 40 casing on the well they are drilling in the midlands, and we have promised to give them credit when delivered to our stock at Moron, at list less 25%." The proposition to return the goods came from Mr. France and Mr. Sands agreed to it, saying if he would take it back to the store, the claimant would give credit on the account. The only reason that was given for Mr. France offering to return the goods is that he told Mr. Sands that they did not have any cash on hand at the time, and that they were willing to return the casing. At that time the company owed a great many other debts, but a similar offer was not made to any other creditors. Mr. France told Mr. Sands that they did not have any money in the treasury, but they had some oil in storage in the Kern River field and expected to sell that and get some money. There had been a fire in the refinery of Warren Bros., where the bankrupt refined its oil, and the bankrupt had about 10,000 barrels of oil in storage which could not be refined, and Mr. France told him as soon as they

could get some money out of it they expected to pay a part of the indebtedness, that they expected to make a payment on account and also on the notes. Mr. Sands was told that the property at that time was not producing sufficient to pay more than certain small debts and labor claims.

At the time the \$2,000 was paid, September 15, 1910, nothing was said, but there is testimony that this \$2,000 was paid on account of a promise made when additional goods were [22] sold by the claimant to the bankrupt August 6, 1910, on account of an immediate payment promised. The money was paid in the ordinary course of business and no conversation took place between the officers of the claimant or officers of the bankrupt in reference thereto.

Prior to this, however, facts had been brought to the knowledge of the claimant that were sufficient to have put a reasonably intelligent person upon inquiry.

The general manager of the company knew as early as February 18, 1909, what were the Cleveland Oil Company's holdings in the Kern River field. He was advised by one of his district managers, on whose information he relied, that they were about to commence operation upon 10 acres in section 8-29-28, known as the York Syndicate property, and also upon 17½ acres in the same section known as the Volcan property, and they were endeavoring to secure other property. At that time the Volcan had one producing well and the York Syndicate two wells. Mr. Sands had been by the property at another time in the Kern River field and testifies that

they had quite a number of wells dug there; that they seemed to be in a very prosperous condition and they were all in where there were producing oil wells, and in addition to that at that particular time the company had a lease on what was considered valuable oil land in the midway next to the Buick Oil Company. December 23, 1909, he knew from Dr. France, the president of the company, that they had eight producing wells and were getting from 8,000 to 10,000 barrels of oil per month.

January 11, 1910, the claimant by its treasurer notified the Oil Well Supply Company at Taft, Cal., that it was privileged to deliver the Cleveland Oil Company supplies to the amount of \$1,500, but for anything in excess of that amount they would communicate with the Los Angeles office. The treasurer [23] says: "They are owing us considerable money and they have not acquired the habit of discounting their bills, which is our reason for the limited credit."

It is no doubt true that credits are often determined under conditions of the account at the time the requisitions are demanded. On January 21, 1910, the treasurer notified the Oil Well Company at Bakersfield, Moron, Maricopa, that the amount of the open account of the Cleveland Oil Co. was \$4,819.58, and that they owed a note due February 28, for \$2,055.42, and another due February 15th, for \$6,617.16, and that they felt that this was quite enough, provided the information which was given them by their district manager at Bakersfield the other day was correct; that they were owing considerable sums for lumber bills and there were other



creditors for other small bills who were not able to get their money; and the letter requested a report from each representative of the company in his district as soon as possible to tell them as regards their holdings, and in the meantime permitting them to make deliveries amounting to \$1,000 for all three stores of the claimant. On August 5, 1910, the Oil Well Supply Company, with which the claimant is affiliated, wrote to the treasurer above named that they were delivering goods to the Cleveland Oil Company in small quantities daily since a telephone communication between the manager at Bakersfield and the treasurer a few days previous, when they were advised that the treasurer expected a settlement from the Cleveland Oil Company. August 6, 1910, the bankrupt owed the claimant almost \$20,000, and the manager at Bakersfield was notified by Mr. Sands to communicate with him before delivering them any great amount of goods.

On the 22d day of August, they were advised that the refinery of Warren Bros. in the Kern River fields, which was operated for the benefit of the Cleveland Oil Company, was destroyed [24] by fire. The secretary of the claimant wrote Mr. Sands as follows: "Had a talk with Mr. Batchelder of the Cleveland Oil Company this morning. It seems that their refinery in the Kern River field burned down Saturday and that they are having trouble in raising the \$1,700 necessary for the 1000 feet 8-inch casing for the Kern River field. It seems that the National sent them a car of 8 $\frac{1}{4}$ " to the Midway field and by mistake their superintendent unloaded it and hauled



it out. You know we gave them 1000 feet there and the result is that they have 2000 feet too much in the Midway field, and have none in the Kern River. They have not taken care of their note due to-day. We are simply giving you this information that you may be in touch with the matter." Mr. Sands endorsed upon this letter a most singular notation, to wit: "Keep after them at least twice a day; make them come through." In common parlance, this, even for a credit man, was "going some," and after information which caused him to give directions to keep after a debtor at least twice a day and make it come through, it would be hard to say that he did not have reasonable notice to put him upon inquiry.

It is true that the account between the Cleveland Oil Company and R. H. Herron & Co., the claimant, was active prior to August 1, 1910. Of the credits given during August, \$1,686.32 was due to the payment of \$1,500 on August 6. There were practically no credits extended to the company during September, and none after October 1st. Upon the notes offered in evidence there were no payments made, except the \$2,000 of September 15th, and the \$2,823.37, less interest, which was credited October 31st of casing returned as aforesaid, the payments here in question. The notes as received from the Cleveland Oil Company were endorsed and discounted by the claimant at its bank. The Cleveland Oil Company did not pay the note due August 21, amounting to \$2,868.15, and the claimant had to take up that note [25] at the bank, and it was overdue and unpaid at the time of the giving of the preference here in

question. The claimant was advised that the Cleveland Oil Company did not have the money at that time to protect the note, and they have as an excuse that they had been disappointed in not receiving it in time. At the time they made the payment of \$2,000 they had been promising the claimant cash for several weeks.

It is probably true that the claimant did not fully investigate the question of the bankrupt's solvency or insolvency because the claimant was satisfied with the guarantee, which it had received from Dr. W. A. France, the president of the company, whom Mr. Sands was advised was financially responsible, that he would see that all claims of the Cleveland Oil Company to R. H. Herron Co. would be paid. If, however, they had made a reasonably diligent inquiry—which they were reasonably bound to have made—it would have disclosed the fact that the Cleveland Oil Company was insolvent at the time the payments, which are in question in this matter, were made to the claimant, and that the claimant was receiving a preference over other creditors.

In *Re Deutsche*, 25 A. B. R. 348, 182 Fed. 435, it appeared that within four months prior to bankruptcy, payments had been made by the bankrupt on notes for a lumber account which had frequently gone to protest and been the subject of constant complaint. Notwithstanding this, the claimants had accepted an order for more lumber, and were about to fill it, when they learned that the bankrupts were in difficulty and did not do so. They were also advised, on inquiry of a bank where the bankrupts were in

business, that their condition had improved, and it was thought that they would pull through. It was held that this suggested critical embarrassment was enough to put claimants on inquiry, and that their claim for the balance [26] due on the notes could not be allowed without surrendering the payments received during the four months' period, which constituted voidable preferences.

See, also, *In re Leader*, 26 A. B. R. 668.

It is established by the Bankruptcy Act, sec. 57c, that the claims of creditors who have received preferences voidable under sec. 60, subdiv. b, shall not be allowed, unless such creditors shall surrender such preference.

The allegations of the objections to the claim of the claimant herein are true, and for the foregoing reasons the objections to the claimant filed herein must be sustained and the claim disallowed, unless said claimant shall surrender the preferences aforesaid.

LYNN HELM,  
Referee.

[Endorsed]: No. 686. In the United States District Court, Southern District of California, Southern Division. In the Matter of Cleveland Oil Co., a Corporation, Bankrupt. Referee's Opinion upon Claim of R. H. Herron & Co. and the Objections of the Trustee Thereto. Filed Oct. 1, 1912, at 10 o'clock A. M. Lynn Helm, Referee. Lynn Helm, Los Angeles, Cal., 918 Title Ins. Bldg.

[Endorsed]: No. 686. In the United States District Court, Southern District of California, Southern Division. In the Matter of Referee's Report on Petition for Review in Re Cleveland Oil Company, a Corporation, Bankrupt. Filed October 22d, 1912, at 40 min. past 9 o'clock A. M. Wm. M. Van Dyke, Clerk. By E. H. Owen, Deputy Clerk. Lynn Helm, 510 Los Angeles Trust Building, Los Angeles, Cal. [27]

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*In the District Court of the United States, in and for the Southern District of California, Southern Division.*

No. 686.

In the Matter of the CLEVELAND OIL COMPANY, a Corporation,

Bankrupt.

**Transcript of Testimony on Hearing on Claim of R. H. Herron Company.**

Before Hon. Lynn Helm, Referee, at his office, Room #918 Title Insurance Building, Los Angeles, California, on the 24th day of July, 1912.

Messrs. HICKCOX & CRENSHAW, Attorneys  
for Trustee.

GEORGE E. WHITAKER, Esq., Attorney for  
R. H. Herron Co.

Filed Sep. 4, 1912, at — o'clock — M. Lynn Helm, Referee. [28]

*In the District Court of the United States, in and for  
the Southern District of California, Southern  
Division.*

No. 686.

In the Matter of the CLEVELAND OIL COM-  
PANY, a Corporation,

Bankrupt.

Messrs. HICKCOX & CRENSHAW, Attorneys  
for Trustee.

GEORGE E. WHITAKER, Esq., Attorney for  
R. H. Herron Company.

Los Angeles, Cal., July 24, 1912.

Ten o'clock A. M.

**[Testimony of Edson France, for the Trustee.]**

EDSON FRANCE, a witness produced on behalf  
of the trustee, being first duly cautioned and solemnly  
sworn to testify the truth, the whole truth and noth-  
ing but the truth, testified as follows:

Direct Examination.

(By Mr. CRENSHAW.)

Q. You were an officer of the Cleveland Oil Com-  
pany during the fall of 1910?

A. Yes, part of 1910; from about the middle of  
July.

Q. From the middle of July until when?

A. Well, I don't know whether I was an officer or  
not—

Q. You were an officer of the company as long as  
it existed? A. Yes, sir. [29]

Q. You prepared the schedule of debts and assets



(Testimony of Edson France.)

of the company which are on file?

A. No, I didn't prepare anything—that is, I didn't prepare it.

Q. You seem to have signed it.

A. I probably looked it over and signed it; that is all so far as I remember.

Q. How did you arrive at the assets and liabilities?

A. Well, I suppose it was mostly from memory.

Q. (By the REFEREE.) Well, was it from the books of the company or anything like that?

A. I don't know whether we had the books at that time.

Q. What is the date of it?

A. What is the date of it?

Q. It was filed on the 20th of January.

A. Yes, I suppose it was taken from the books.

Q. No—it was prepared after that, on the 16th day of March. Do you know whether or not it was compiled from Mr. Mushet's report?

A. I don't know whether it was prepared that way or not.

Q. It is a correct statement of the assets and liabilities, is it?     A. Yes, sir.

Q. Between the 16th day of March, 1911, and the 12th day of September, 1910, was there any material change in the assets and liabilities of the company?

A. Not to my knowledge, there were no changes.

Q. There was no new property acquired during that period? [30]     A. No.

Q. None of your property disposed of during that

(Testimony of Edson France.)

period?     A. Not to my knowledge.

Q. Were you operating during that period at all?

A. Part of the time, the first part of the time.

Q. How long after the 12th of September were you operating?

A. Up until we went into bankruptcy. I don't know how long.

Q. (By the REFEREE.) From the 12th of September that fall, did you operate up to the first of January?

A. Yes, they were operating up in the Kern River field.

Q. They were operating in the Kern River field from the 12th of September to the 1st of January?

A. No, that was 1910.

Q. (By the REFEREE.) In 1910 you were operating?     A. Yes, sir.

Q. In 1911 you did not?

A. From the first of September, 1910, to the first of January, 1911, you see, the order of adjudication was made.

Q. (By the REFEREE.) That is it. From the first of September, 1910, to the first of January, 1911, were you operating during that time?

A. Yes, sir.

Q. What was the nature of your operations during that time?

A. Producing some oil in the Kern River field.

Q. Were you drilling any wells?

A. Not at that time that I remember. [31]

(Testimony of Edson France.)

Q. Did your production take care of your operation?

Mr. WHITAKER.—That is objected to on the ground that it is not the best evidence and further that it calls for the conclusion of the witness.

The REFEREE.—Objection sustained.

Q. Could you tell by examining the books as to what was the cost of production?

A. I could not. I am not very familiar with the books, and I was never financially interested with the Cleveland Oil Company, I was simply put in to fill a vacancy for a short time and never have been to the oil fields and don't know very much about it.

Q. Who were familiar with the books?

A. Mr. Batchelder was secretary. I was just put in to fill this vacancy and I never got very much knowledge about it. I have not seen the books for a year, I think, and that is the reason I have forgotten.

Q. Are you acquainted with the R. H. Herron Company? A. Yes, with Mr. Sands.

Q. Did your company have dealings with R. H. Herron Company during 1910? A. Yes, sir.

Q. And become indebted to them?

A. Yes, we bought goods of them right along.

Q. Do you remember when you ceased to buy goods from R. H. Herron Company?

A. No, I could not give you the date, probably in July, 1910, somewhere along there, maybe a little later. [32]

Q. That time you were indebted to them?

(Testimony of Edson France.)

A. Yes, sir.

Q. Did you say Mr. Sands was their representative with whom you did business?

A. Yes, I talked to Mr. Sands several times.

Q. Did you ever do business with any other officer of the Herron Company?      A. I did not.

Q. During the months of August and September did you have any conversation with Mr. Sands with reference to the account of R. H. Herron Company with the Cleveland Oil Company?

A. I don't think so at that time. Judge Campbell was president of the company during that time, but I talked to Mr. Sands a little later.

Q. About what time?

A. About October or November, I have forgotten the date, somewhere in there.

Q. What was the nature of the conversation?

Mr. WHITAKER.—We object to that; we object to any conversation which took place between the witness on the stand and Mr. Sands during the month of November, 1910, on the grounds that the objection to this claim being allowed relates to a later period—I will withdraw that, I see there is one item in December.

(Question read by Reporter.)

A. Why, it was in regard to paying the bill we owed Mr. Sands; making payment on the account, and the notes.

Q. Well, can you detail those conversations, what was said by you and what was said by Mr. Sands?

(Testimony of Edson France.)

A. Well, Mr. Sands said he had to have some money on account, on some notes which were due, and at that time I told Mr. Sands that we didn't have any money, but we had some piping and things which we bought of him at the oil fields which we would return. He said he would take them and give us credit, I think, for 25 per cent less than what we paid for it, something like that.

Q. Did Mr. Sands ever go into the financial condition of the company with you?

A. I don't think that he did.

Q. He never asked you about how the company stood, what its obligations were, or what its assets were?

A. I don't remember. I presume he had found that out before that.

Q. Prior to October or November did you ever give him any statement?

A. I don't remember of giving him any statement.

Q. When were those notes given?

A. At different times. I could not tell you.

Q. Do you know of any other occasion of giving the notes except the carrying of this account as an open account?

A. I don't know very much about it.

Q. You don't know why it was done?

A. When they could not pay their bill when it was due, they gave a note, as I understand.

Mr. WHITAKER.—If you know how to answer of your own knowledge, state it; not otherwise.

The WITNESS.—Well, the fact is I don't know



(Testimony of Edson France.)

anything about it except what the books show, and I didn't keep the books. [34]

Mr. CRENSHAW.—Are those notes on file here?

The REFEREE.—Yes, right here.

Q. Who are they signed by?

A. They are signed Cleveland Oil Company by W. A. France, President, and W. J. Batchelder, Secretary. There are different dates on them here.

Q. Now, Mr. France, when you had this conversation, which you say was sometime in October or November, with Mr. Sands, and told him that you could not pay him the account, and that he would have to take back some of the old machinery if he got anything, what did he say?

Mr. WHITAKER.—We object to counsel stating facts not shown by the testimony. The witness never testified he told Mr. Sands the Herron Company would have to take back any machinery or they would not get anything. That is not the testimony. I want this record correct.

The REFEREE.—Objection sustained.

Q. Well, at the time of this conversation that you have related, where were you?

The REFEREE.—The witness stated he didn't have any money—

Mr. CRENSHAW.—He told him he couldn't pay it, I believe he said.

Mr. WHITAKER.—That is correct.

Q. What did Mr. Sands say when you told him that you could not pay him?

A. He said he would take it back.

(Testimony of Edson France.)

Q. How did he happen to say he would take it back?

A. I made a proposition to him that we would return it to him. He said if they took it back to his store they would [35] give us credit on the amount.

Q. How much?

A. I don't remember the amount. I suppose it was \$2,000 or \$2,500, somewhere along there.

The REFEREE.—You didn't understand that question. You said less—

Mr. CRENSHAW.—Yes, I understood him to say “less 25 per cent of what they bought it for.”

The WITNESS.—Yes.

Q. (By the REFEREE.) And you returned him about \$2,000 worth?

A. At the time, about \$2,000, and I think there was some returned a little later than that. He would not give us credit for the full amount on account of the pipe having been used. It was what they called second-hand, you know, if I remember, he said he would give us credit for the amount we paid, less twenty-five per cent.

Q. Did Mr. Sands know anything about whether the machinery was being used? A. I don't know.

Q. Did you tell him?

A. I could not say whether I did or not.

Q. Did you make any statement to him as to why you wished to return it to him?

A. I told him that we did not have any cash on hand at the time, and that we would have to do that.

(Testimony of Edson France.)

Q. Did you take this machinery and pull it out of the hole in order to return it to him?

A. It was there on the ground, I understand; I understand [36] it was piping up there which was not being used.

Q. Had it been used?

A. I could not say whether it had been or not.

Q. Well, did you tell him if it had been used or had not been used?

A. I don't think I told him either one, I don't know whether he knew or not.

Q. About the month of September was there a committee appointed by the stockholders for the purpose of going over the affairs of the Cleveland Oil Company—an expert accountant?

Mr. WHITAKER.—Objected to on the grounds that the books are the best evidence.

The REFEREE.—Objection overruled.

Mr. WHITAKER.—Exception.

A. I think it was in September.

Q. Who was the expert?      A. Mr. Mushet.

Q. Do you know whether or not he made an examination of the books and affairs of the company?

A. He did.

Q. Was Mr. Sands around the office at any time, if you remember, while that report was being made?

A. I never saw him around there, I never heard them say anything about looking into the report.

Q. Do you know whether or not he was familiar with the fact that investigation was being made by the stockholders?      A. I don't know.

(Testimony of Edson France.)

Q. He never said anything to you about it? [37]

A. No, he never mentioned it.

Q. Do you remember the date that you, as an officer of the Cleveland Oil Company, became involved with the Federal authorities?

Mr. WHITAKER.—We object to that as incompetent, irrelevant and immaterial for the purposes of the hearing before the master and referee.

Mr. CRENSHAW.—The purpose is simply to show the date, and then I want to ask the witness if Mr. Sands knew anything about that.

The REFEREE.—I think it is a proper question. Objection overruled.

Q. What do you know about the date?

A. It was in the last of December or first of January. Somewhere around in there.

Q. (By the REFEREE.) December, 1910?

A. December, 1910.

Q. Well, did you ever see Mr. Sands about that time with reference to the affairs of the Herron Company?

A. I don't remember seeing him after that time. I don't have any knowledge of talking with him.

Q. Do you know anything about the market price of the stock of the Cleveland Oil Company, during the summer of 1910 and the fall, as listed on the exchange?

A. I could not give you any figures now.

The REFEREE.—Answer yes or no.

A. No, I could not give any exact figures.

(Testimony of Edson France.)

Q. Do you know approximately what the figures were?

Mr. WHITAKER.—We submit, Mr. Referee, that the market [38] report would be the best evidence.

The REFEREE.—He could not state what they were, but just state yes or no. If you know what those quotations were say “yes” or if not, say “no.”

A. No, I do not.

Q. Do you know what the stock was selling at in September, 1910, on exchange? A. No.

Q. Do you know what it was selling at in November? A. No.

Q. Are you able to identify the books of the Cleveland Oil Company? A. Yes.

Q. Will you look these over, the journal and the ledger?

(Counsel produces books.)

A. I can't identify this one here. (Witness indicates.)

Q. What does that purport to be?

A. It says “Cash-book.” I am not very familiar with the books. That one there (indicating) I don't remember seeing before.

Q. Well, is this the ledger?

A. Yes, these two ledgers, I remember those.

Q. Does this ledger here contain that Herron Company account? Will you turn it over and see?

A. Yes, it is right here (indicating).

Q. Can you tell by looking at this account of R. H. Herron & Company when the last credit was given to



(Testimony of Edson France.)  
the Cleveland Oil Company?

Mr. WHITAKER.—I don't wish to be technical, but here is [39] a witness on the stand who has testified that he had nothing to do with the books, that they were kept by Mr. Batchelder; any outsider could tell when the last credit was made but the only person who could state whether that credit is on the true date or not is the person who kept those books. or under whose supervision they were kept.

Mr. CRENSHAW.—In view of the fact he is president of the company if he testifies he can do it—

The REFEREE.—He didn't say he could do it.

Mr. CRENSHAW.—I asked him if he could.

A. I could not.

Q. Now, isn't it true, Mr. France, that part of this last credit was given by the R. H. Herron Company which appears as of December 31st, the sum of \$300.00—I think it was a pump or some such machinery— A. Two pumps.

Q. Isn't it a fact that those were returned after the time at which you became involved with the Federal authorities?

A. I think not. I should say no.

Q. Well, you are positive that no action was taken, or no arrests made of the officers of the Cleveland Oil Company until after January first?

A. I could not give you the dates.

Q. The question was December 31st.

A. I could not say what the date was, as I can't remember it, but it was the latter part of December or the first part of January. I have not thought

(Testimony of Edson France.)

about it for several months and I have forgotten.

Q. How many times did you see Mr. Sands during October and [40] November?

A. Oh, a few times; probably three or four times.

Q. Whereabouts did you see him?

A. I was at his office a few times, and then he was in our office, probably once or twice.

Q. What was the occasion of your going down to his office?

A. I was down to explain why we didn't pay him some money he had demanded.

Q. How strongly did he demand it?

A. He simply insisted he had to have it.

By the REFEREE.—What explanation did you give?

A. I told Mr. Sands we did not have any money at that time; that we had some of this piping up on the oil fields which we would turn over to him if he would take it.

Q. Well, at the time that you were having these conversations with Mr. Sands the company was in pretty bad shape financially, was it not?

Mr. WHITAKER.—We object to that as incompetent, irrelevant and immaterial, not binding upon the respondent to this citation and objection, unless it is shown to have been within the knowledge of the respondent, the R. H. Herron Company, the fact that is, that knowledge would not bind this defendant, or give him any grounds to believe that any preference was intended.

The REFEREE.—If the company was not insolv-

(Testimony of Edson France.)

ent there would not be any preference on the part of the company. Now, in order to determine the first question it may be shown whether the company itself was insolvent, if it was insolvent it might be deemed to have given a preference, but the [41] next question is, whether it was taken with the reasonable cause to believe that they were insolvent. The question is competent for the purpose of showing the first question, it is material to that extent. You may answer the question.

(Question read by Reporter.)

A. I would not consider it in very bad shape.

Q. Well, didn't you testify here a short time ago that there was practically no change in the assets and liabilities? A. I did.

Q. Well, do you consider your company in a bad shape by this schedule that you made out?

Mr. WHITAKER.—That is objected to as calling for a conclusion of the witness.

The REFEREE.—Objection sustained.

Q. How many times did you go down to Mr. Sands' office? A. Oh, two or three times, I think.

Q. What did you tell him when you went down there?

A. I went down to see Mr. Sands because he demanded money from us and I told him that we didn't have any money at that time, and I told him about the pipe that we had upon the Midway field, we would return to him.

Q. That was a voluntary suggestion on your part that you would turn back the pipe?

(Testimony of Edson France.)

A. Yes, it was.

Q. Did you put any price on it?      A. No, sir.

Q. You were willing to take whatever he would give you?

A. Any fair price, anything that was reasonable.

Q. Well, at that time you owed a great many other debts [42] beside to R. H. Herron & Company, did you?      A. Yes, sir.

Q. And did you make a similar offer to any of the other people?      A. We did not that I know of.

Q. You didn't offer to give them any part of this pipe or pumps?      A. No.

Q. Were they after their money?

A. Some of them were; yes.

Q. Did any of them sue you for their money about that time?

A. I think there was a suit somewhere about that time by somebody but I don't remember who it was.

Q. Isn't it a fact that the Alexon Machine Company sued you about that time?

A. That was a little later, if I remember right.

Q. How much later?      A. I could not say.

Q. Isn't it a fact that in the later part of November that they brought a suit against you and had the sheriff in charge of your office for a couple of days?

Mr. WHITAKER.—We object to that as not binding on this respondent, and upon the further grounds that the record is the best evidence that the suit was brought.

Mr. CRENSHAW.—I want to show that the man was in charge.

(Testimony of Edson France.)

The REFEREE.—Answer the question.

A. I could not give the date, but a suit of that kind was brought. [43]

Q. That was before December 31st, was it not?

A. I don't remember the date, I think it was.

Q. Did Mr. Sands at any time intimate to you that he knew what was the condition of the Cleveland Oil Company? A. He did not.

Q. Did he ever threaten to sue the company?

A. Not to my knowledge.

Q. What made you so anxious to go down and see Mr. Sands and make a settlement with him that you should go down to his office on several different occasions and offer him this pipe back?

Mr. WHITAKER.—That is objected to on the grounds that it has been asked already several times and answered.

The REFEREE.—Objection overruled. Answer the question, subject to the objection—what was the reason for your anxiety in going down to see Mr. Sands.

A. Well, my brother being connected with the oil company, Mr. Sands said he was going to try to collect of my brother, W. A. France.

Q. He said he was going to collect it from your brother? A. Yes, sir.

Q. How did he say he was going to try to collect it from your brother?

A. Well, he said my brother said he was going to see that the bill was paid.

Q. Did he say why he was going to look to your



(Testimony of Edson France.)

brother instead of the Oil Company?

A. Mr. Sands said that my brother agreed to see that the bills were paid. [44]

Q. Did he intimate to you that he thought that there was a better chance to get it out of your brother than the Cleveland Oil Company?

Mr. WHITAKER.—That is objected to as incompetent, irrelevant and immaterial, asking for a conclusion of the witness.

The REFEREE.—Objection sustained.

A. Mr. Sands said that he was going to telephone or write to my brother to send a payment of a couple of thousand dollars on account.

Q. (By the REFEREE.) What did you say?

A. It was the time that we were talking about returning this pipe and things there, I told Mr. Sands that we would return this pipe.

Q. (By the REFEREE.) Give us the whole conversation as near as you can that you had with Mr. Sands at that time.

A. That is all my part of it. I don't remember anything more.

Q. (By the REFEREE.) What did you tell him about your reasons for not making the payment?

A. I told him we did not have the money in the treasury at the time.

Q. (By the REFEREE.) Did you tell him why you didn't have the money in the treasury?

A. The production had not brought in enough to pay him. We had other bills to pay, the payroll and other expenses.

(Testimony of Edson France.)

Q. (By the REFEREE.) Did you tell him you were selling stock? A. No.

Q. Did you tell him that you expected any remittances [45] from any source?

Q. Well, we had some oil in storage in the Kern field and we expected to sell that and get some money.

Q. Did you tell him that?

A. Yes, sir. I told Mr. Sands that they had had a fire down there—that we had about 10,000 barrels of oil in storage.

Q. (By the REFEREE.) What did you tell him about that oil in storage?

A. I told him as soon as we could get some money out of it we expected to pay it in part, to make a payment on account and on the notes.

Q. You say you had a fire?

A. We had a fire up there in which the refinery burned. It was where our oil was being taken, but did not belong to us.

Q. You didn't have any fire, then, of your own property? A. No, sir.

Q. And did not, therefore, tell Mr. Sands that you had any fire or loss at all. You just simply had oil in stock.

A. Yes, we had the oil up there and could not ship it on account of the refinery being burned down.

Q. What else did you tell him?

A. That is all that I remember at the present time. I can't think of anything more.

Q. How much of this machinery was purchased—all of it from the Herron Company, that you returned

(Testimony of Edson France.)

to them?     A. I don't know.

Q. You don't know whether it was their goods that went back to them or other goods?     [46]

A. I don't know, I could not say. I suppose it was bought from the Herron Company. I did not see it myself.

Q. Did you return all the machinery that you had on hand to them?     A. I could not say.

Q. Well, didn't you make the deal with them?

A. I made the deal with them, and the man on the field was instructed to take certain things over to Mr. Sands' store, but I never knew what that was.

Q. Did you instruct him what to do?

A. We did.

Mr. CRENSHAW.—I think that is all.

Cross-examination.

(By Mr. WHITAKER.)

Q. Where do you reside, Mr. France?

A. 1737 West Adams Street, Los Angeles.

Q. How long have you been a resident of Los Angeles?     A. About two years.

Q. When did you first become interested in the Cleveland Oil Company as a stockholder, approximately.     A. About July the 16th or 17th, 1910.

Q. And immediately after that you were elected to the directorate, or appointed?     A. Yes, sir.

Q. In what capacity, sir?

A. As treasurer and vice-president.

Q. The books of account of the corporation were not kept by you or under your supervision, were they?     [47]     A. No.

(Testimony of Edson France.)

Q. And any report you may have signed was simply signed upon the statement made to you by your subordinates or the person having charge of that particular work.     A. Yes, sir.

Q. And you accepted it as correct?

A. Yes, sir.

Q. Now, you say that you talked with Mr. Sands about three or four times in regard to the account of the Herron Company?     A. I did.

Q. And during those conversations you stated that the property at present was not producing sufficient to more than pay certain small debts and labor claims?     A. Yes, sir.

Q. And you also informed him that your company had about 10,000 barrels of oil in storage and which you were unable to dispose of at that particular time?

A. Yes, sir.

Q. And therefore at that time there were no funds in the treasury sufficient to meet these obligations?

A. Yes, sir.

Q. And you stated to him, I believe, that the company would return to the R. H. Herron Company a string of pipe which it had in the field and was not using?     A. Yes, sir.

Q. And Mr. Sands said he would allow you the reasonable value of credit, which he said was 75 per cent of the stock price? [48]

A. That is as near as I can remember.

Q. And the transaction was consummated in that manner?     A. Yes, sir.

(Testimony of Edson France.)

Q. And so far as you know this string of pipe had originally been purchased from the H. R. Herron Company? A. Yes, sir.

Q. And later on, certain pumps, two in number, were returned to the R. H. Herron Company?

A. Yes, they were returned.

Q. Now, the pumps, where were they purchased originally, so far as you know?

A. Well, I don't know anything about the pumps.

Q. During the month of September, 1910, I think on the 15th day of September, \$2,000.00 was paid to the R. H. Herron Company by the Cleveland Oil Company—so far as you know was or was not that money paid to the company on some indebtedness in the ordinary course of business?

A. It was, so far as I know.

Q. Now, did your company do any business with a firm known either as the National Supply Company or the California National Supply Company?

A. I think they did.

Q. Do you know whether any material was returned to the California National Supply Company and accepted by that company in the same manner?

A. Not to my knowledge.

Q. Not to your personal knowledge. Now, did Mr. Sands ever state to you that he would like to have his money paid or notes paid when they became due? [49] A. Yes, sir.

Q. And at one time he said, I believe you so stated to counsel, that he would have to call upon Dr. France who had in some way or other guaranteed the



(Testimony of Edson France.)

account?     A. Yes, sir.

Q. And you have now stated practically and substantially the conversation between yourself and Mr. Sands, you representing the Cleveland Oil Company and Mr. Sands representing the R. H. Herron Company?     A. Yes, sir.

Q. And you think these federal proceedings were instituted some time after the first of January, 1911?

A. I am not sure about that, whether it was in December or January.

Q. Do you know whether the company—of your own knowledge I am calling for, Mr. France,—was selling any treasury stock during either the months of September, October, November or December, 1910?     A. Not to my knowledge.

Q. But the company was producing oil?

A. Yes, sir.

Q. It had ceased active drilling operations, however?     A. Yes, sir.

Q. And was confining itself to production?

A. Yes, sir.

Mr. WHITAKER.—That is all.

Redirect Examination.

(By Mr. CRENSHAW.) [50]

Q. What was your production by day, do you know?     A. I could not say.

Q. Approximately.

A. I could not give you any idea of what it was.

Q. You have no idea of what the company was producing?

A. I am not very familiar with the oil business

(Testimony of Edson France.)

myself. I was put in there to fill a vacancy for a short time.

Q. You say you had 10,000 barrels of oil on hand?

A. Yes, sir.

Q. Where did you have that?

A. We had it in storage up there.

Q. What was oil worth at that time in that particular place, do you know?

A. Well, the oil that we had was contracted for, I think at sixty cents.

Q. That oil was in storage?      A. Yes, sir.

Q. Has it stayed there?

A. I don't know anything about it now.

Q. Who was it contracted to?

A. Warren Brothers.

Q. Was that the refinery that burned down?

A. Warren Brothers leased the refinery.

Q. Did you collect sixty cents a barrel for this oil that was sold to Warren Brothers?

A. At the time that is what it was contracted for.

Q. As a matter of fact they didn't pay that at that time?      A. Not at that time. [51]

Q. Don't you know that they were to pay you less than sixty cents?

A. We were holding it for them in storage until they got a new refinery rebuilt, and I think at that time we had to make a new contract.

Q. Isn't it a fact that you were selling oil to them at less than forty cents?

A. We were to get sixty cents, so far as I can remember.

(Testimony of Edson France.)

Q. I believe you said that you told Mr. Sands as soon as you sold this oil you were going to pay him?

A. Yes, sir.

Q. You didn't have any idea of what the oil was going to be sold for?

A. Well, we sold it later to Warren Brothers, and on account of the refinery being burned down, and our needing some money I told Warren Brothers if they would give us sixty cents a barrel we would sell it to them.

Q. Well, did they take it?

A. Part of it and sent us a check.

Q. And paid you fifty cents a barrel for part of it?

A. Yes, sir.

Q. Do you remember how much they took?

A. I have forgotten just how much that was. I think it was half of it, 5,000 barrels; something like that.

Q. Do you mean to testify, Mr. France, that this schedule which you signed, that you didn't know what was in it?

A. I knew about it and looked it over. I would say it was correct so far as I could testify.

Q. You were familiar with the assets and indebtedness [52] of the company at the time?

A. Yes, sir.

Q. (By Mr. WHITAKER.) The value of these assets and liabilities were not placed by you on that sheet? A. No.

Q. Whom were they placed there by, if you know?

A. I presume they were taken off the books.

Mr. WHITAKER.—That is all.

[**Testimony of Wm. H. Moore, Jr., for the Trustee.**]

WM. H. MOORE, Jr., a witness produced on behalf of the trustee, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. CRENSHAW.)

Q. Mr. Moore, you are the trustee in the estate of the Cleveland Oil Company, bankrupt?

A. Yes, sir.

Q. And the assets of the company came into your hands? A. Yes, sir.

Q. Did you dispose of them?

A. Yes, sir; all that I could ascertain.

Q. Well, please state what you obtained for them.

A. In the neighborhood of about \$10,000.00, and that was entirely from oil that was produced on leases held by the Cleveland Oil Company. The leases themselves were valueless and went back to the lessors.

Q. Are there any assets except money in the hands of [53] the trustee?

A. Not at this time; no.

Q. Has any oil come into your hands as trustee?

A. About \$10,000.

Q. Have you sold it? A. Yes, sir.

Q. Do you remember what price you got for it?

A. Forty cents,—the market price.

Q. Have you got a list of the properties that came into your hands?

A. Well, I have various parts of my records. I

(Testimony of Wm. H. Moore, Jr.)

have not those records here, but I know approximately what came into my hands.

Q. Well, I will ask you if those were the properties. (Counsel produces document.)

Mr. CRENSHAW.—Mr. Whitaker, this is a copy, not the original schedule. Will you permit it to be used?

Mr. WHITAKER.—Oh, certainly, certainly.

A. Yes; those were the properties of the estate and there was some personal property on some of these leases.

Q. Now, you say those leases, you lost them; what did you mean by that?

Mr. WHITAKER.—No, he said they were valueless.

A. There was a lease from the California Kern Oil Company which came into my possession and I took possession of the land and continued the pumping of oil for a little while, but could not do it profitably; and the California Kern Oil Company took proceedings, I think in this court, to cancel the lease on the grounds that the Cleveland Oil Company had not [54] fulfilled all the provisions of the lease. I don't remember now just what the provisions were that were not fulfilled, but I think it was the drilling of wells or else they had not paid the royalties.

A. I think that appears in the records in this bankruptcy proceeding.

Q. Did you pump any other wells?

A. The Volcan lease was the only lease on which the wells could be pumped profitably. I pumped



(Testimony of Wm. H. Moore, Jr.)

those wells, and there was a suit pending at the time of the bankruptcy proceedings to declare that lease forfeited. That matter was brought into this court here for a cancellation of the lease, and after a hearing it was cancelled. None of the provisions of that lease have been fulfilled. That lease provided for a 25 per cent royalty, and it was of no value. Oil could not be pumped and sold for enough to pay the royalty and the expenses. It was subject to an \$83,500.00 bond issue outstanding. It was of no value at all to the estate, it was probably worth \$8,000.00.

Q. What was the value of the personal property that came to your hands, do you know?

A. Not to exceed \$3,000.00.

Q. Has it been disposed of?

A. Most of it went back to the companies that sold it and some of the things were attached.

Cross-examination.

(By Mr. WHITAKER.)

Q. Had you ever had any experience in the oil business prior to the time you were appointed trustee in bankruptcy [55] of the Cleveland Oil Company?

A. I had been trustee of other oil companies.

Q. Had you had any experience in the oil business prior to that time? A. Only as trustee.

Q. Does that involve the pumping of wells to any great extent?

A. Not to any great extent, but it covered that in each case.

(Testimony of Wm. H. Moore, Jr.)

Q. Do you know how much that property which was held under lease of the California Kern Company was producing per month? A. Yes, sir.

Q. How much? A. Less than \$1,000.00.

Q. Do you know how many wells they had on it?

A. I don't recall. I think it was about three or four.

Q. Was any defense made to that suit or did you permit it to go by default, the suit for cancellation?

A. I had to let it go.

Q. I asked you if you had made any defense or did you permit it to go by default.

Mr. CRENSHAW.—I think the record will show that.

The REFEREE.—Answer yes or no.

A. I don't know the defense; that is a question of law.

Q. As to the lease held by the Volcan Company, was that contested or let go by default?

A. Very vigorously contested.

Q. You say that the Volcan Oil Company lease could not [56] be operated at a profit?

A. Not and pay the royalty.

Q. Don't you know, as a matter of fact, that the Volcan Oil Company subsequently leased that property to the Midway Field Company, that they are pumping and operating it?

A. No, I don't know anything about it. I know that the wells are now being pumped. I don't know who is doing it.

Q. Do you think that they would pump them at

(Testimony of Wm. H. Moore, Jr.)

a loss?     A. I don't know anything about it.

Q. Did you make an examination of the books of the corporation after they came into your possession?

A. No books or papers of any kind of the company ever came into my possession.

Q. No stock books?     A. No record of any kind.

Q. Did you make any inquiries for them?

A. Yes, sir.

Q. And you were unable to find them?

A. I found out where they were.

Q. Did you ever get them?

A. They were in possession of the Postal Inspectors and they refused to turn them over.

**[Testimony of W. C. Mushet, for the Trustee.]**

W. C. MUSHET, a witness produced on behalf of the trustee, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. CRENSHAW.)

Q. Were you employed by representatives of the Cleveland [57] Oil Company to investigate the books of the company?

A. I was employed by a committee representing the stockholders to make an investigation of the books.

Q. About what time was that, do you know?

A. We made it in October, I think, 1910; the report was dated November 21, 1910.

Q. Did you examine their books and go into their

(Testimony of W. C. Mushet.)

affairs?     A. I did, sir.

Q. Did you make a report?     A. I did.

Q. From an examination of their books and from the notes you took, can you tell what their total indebtedness was at the time of your examination as appears in the books?

A. I cannot from memory. I probably could from this copy of the report.

Mr. WHITAKER.—We have no objections.

The REFEREE.—Examine it and answer the question.

A. It is eighteen months since I saw this report, and I went into the matter very thoroughly at that time.

The REFEREE.—You are asked for a statement as to the liability.

A. The liability, outside of the liability to stockholders and bondholders, is in the neighborhood of \$57,000 or \$58,000.

Q. What was the total amount of obligation on bonds, if you can tell, at that time?

A. About \$87,000. The bond issue was \$100,000 and there seemed to be \$13,000 unissued, which would make about \$87,000 issued. [58]

Mr. CRENSHAW.—That is all.

Cross-examination.

(By Mr. WHITAKER.)

Q. Is that the report or a copy of it?

A. It seems to be a copy of the report, sir.

Q. Let me have it, please. (Counsel examines document.)

(Testimony of W. C. Mushet.)

Q. Now, about when, if you know, have you any record, if you don't know of your own knowledge at this time, it being eighteen months ago, when you commenced work on the books?

A. I believe it was in October, 1910.

Q. What time in October?

A. I could not tell you; probably in the early part of October.

Q. And it took you approximately two months to make this report?

A. I should think it would; of course that was eighteen months ago.

Q. Have you any memoranda in your possession that would show?

A. Yes, I can tell you the day and the hour.

Q. Can you bring that to the referee this afternoon so we can have it in the record?

A. Yes, if the referee so orders.

The REFEREE.—Very well, Mr. Mushet, have that here this afternoon.

Q. I notice this report is addressed to "Philip L. Wilson, Esq., Chairman of Stockholders Committee, Cleveland Oil Company, Los Angeles, Cal.," and is dated Nov. 21, 1910. You say that it was about that time that you delivered this [59] report or a copy of it to Mr. Wilson?

A. Either the day or the following day.

Q. At any rate, no other report was made prior to November 21st by you to the stockholders or to the Committee appointed?      A. No, no.

Q. I call your attention, Mr. Mushet, to page 47



(Testimony of W. C. Mushet.)

of your report which contains the following item: Volcan royalty paid, \$2,555.69; California Kern paid, \$1,138.04—did the books of the corporation, the Cleveland Oil Company, when you examined them at that time, show that these amounts had been paid on account of royalties to those respective companies?

A. I cannot recall. I might be able to tell from the report.

Q. There is the report, sir, page forty-seven, about the center of the page.

A. I think they probably paid it, but I want to be sure before I answer the question. (Witness examines document.)

A. Yes, I should say that \$2,555.69 was paid to the Volcan Oil Company and \$1,138.04 was paid to the California Kern Company.

Q. As a matter of fact, the books show that, and you made that report.

A. I made this report showing this among the credits. I don't know; I can't remember. It is probably in money but I would not swear to it.

Q. There is the word "Paid."

A. It is the word "Paid"; yes. I would like to be very definite, but I have had so many things in between, that and [60] this, that it is pretty hard to remember.

Q. I presume your figures are absolutely correct—can you indicate where you have obtained the assets?

A. No; that is something I could not do. I had to take the book figures on account of assets.

(Testimony of W. C. Mushet.)

Q. Did you take the book figures?

A. Well, yes, on September 30th.

Q. State what they show, will you please?

A. Cash on hand—this is prior to September 30, 1910, this is the statement that I referred to in speaking of the assets and liabilities, aside from the bonds on September 30th, 1910—cash on hand \$129.26. It shows oil properties and leases, \$253,163.05; and then it shows the development in different companies, \$172,852.35; the France Midway cook-house, \$1,521.51; office furniture and fixtures, \$770.92.

Q. Anything else?

A. I think that is about all. I think that is about the credit—you see the value of those things I don't know.

Q. So that any person who inspected the books on Sept. 30, 1910, would find these apparent assets set forth on the books? A. Yes, sir.

Q. Did you make any attempt at all to verify the correctness of those figures? A. No, sir.

Q. You do not know whether the figures are the true value of the assets? A. No, sir. [61]

Mr. WHITAKER.—I think that is all, Mr. Mushet.

The REFEREE.—You can telephone that data to us, Mr. Mushet, as soon as you get back.

A. I will do it right away, sir.

Redirect Examination.

By Mr. CRENSHAW.—The report, Mr. Whitaker, shows that the returns from these different oil leases

(Testimony of W. C. Mushet.)

were taken from the books.

Mr. WHITAKER.—Well, I don't know; it may be. I have not looked at that.

Q. Could you tell from the report what the books show to be the returns from the different oil leases?

A. That is pages 11, 12 and 13—well, which particular lease do you want—the York Syndicate?

Q. I would like to have them all to show the returns. Let me see, now; first give us the York Syndicate development and production.

A. That is on page 7. The book shows that the only sale of oil from this lease was in August, 1910, when 212.32 barrels were sold at sixty-five cents, producing \$138.00. There is \$138.00 in money received from that lease.

Q. The Volcan lease?

A. The books show sales from this lease as follows: amounting to \$13,062.53.

Q. For how much a barrel?

Mr. WHITAKER.—We will stipulate on behalf of the R. H. Herron Company that these reports may go in.

Mr. MUSHET.—I have a copy of it; this is an exact copy.

Mr. WHITAKER.—I am satisfied if Mr. Mushet says it is [62] a copy.

The REFEREE.—The copy will be received in evidence and marked Claimant's Exhibit 2.

Mr. CRENSHAW.—That is all for Mr. Mushet. Now, I would like to put Mr. Sands on the stand

and ask him a few questions before the adjournment at noon, as to some evidence I want to go into.

**[Testimony of John M. Sands, for the Trustee.]**

JOHN M. SANDS, a witness produced on behalf of the trustee, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. CRENSHAW.)

Q. Mr. Sands, what is your present position?

A. Manager of the R. H. Herron Company.

Q. And during the months of September, October, November and December, 1910, what position did you occupy?     A. A similar one.

Q. Do you also do the credit work for the company?     A. I do.

Q. And during those months were you engaged in those services for the company?     A. I was.

Q. Do you read the Los Angeles daily papers?

A. I do whenever I have the time.

Q. Well, whenever you have the time—do you take a paper?     A. Why, yes.

Q. At the time which one were you taking, in the fall of [63] 1910?

A. I take the Los Angeles “Times.”

Q. The Los Angeles “Times”; do you generally read that?

A. Not invariably. I don’t find the time to read it every day.

Q. You don’t read it regularly?

(Testimony of John M. Sands.)

A. Not regular.

Q. Well, about how many times a week did you read the "Times"?

A. Well, that is difficult to answer, it is—I would say not one-half of the time.

Q. Well, did you look in the "Times" for notes on your business, the oil information, for instance?

A. If I was reading the paper I should look for that column.

Q. But you didn't read it but about one-half the time? A. That is all.

Q. And during the fall of 1910, I presume your habit was about the same?

A. I should think it was.

Q. Do you ever read the "Examiner"?

A. Occasionally.

Q. About how many days out of the week do you read the "Examiner"?

A. We were not taking the "Examiner" during this period to which you have reference.

Q. You didn't read the "Examiner" during that period? A. No, sir.

Q. Did you read the "Herald" during that period? [64]

The REFEREE.—There was not any "Herald" during that time.

Mr. CRENSHAW.—The "Morning Herald" was going at that time, I think.

Q. I think that you testified on the proceedings here in this matter that you kept a press clipping-book down at your office; is that correct?



(Testimony of John M. Sands.)

A. I testified that there was cut out from different newspapers clippings which had reference to the oil business, and I further testified that at that time we didn't subscribe to a press clipping bureau. I wish, if it is possible here, to correct my testimony at that date. After giving my evidence here, I made inquiry and ascertained that at that particular time we were subscribers to the Dake's Clipping Bureau.

Q. Well, now, have you those clippings on file in your office that were sent to you by Dake's?

Mr. WHITAKER.—With reference, of course, to this particular company?

Q. Yes.

A. I doubt if they are, for the reason that where they had reference to a particular fact they are filed in and under its particular heading. For example, if it is the Cleveland Oil Company, it would have been under the Cleveland Oil Company heading.

Q. Well, have you got clippings of the Cleveland Oil Company in your office?

A. I have them here. I have here the clippings of December 20th; this is the first clipping that comes to my knowledge, of anything published so far as my records are concerned, [65] of the Cleveland Oil Company. I have reason to think that perhaps it is the first public record.

Q. I notice there are two clippings, one from the Los Angeles "Examiner" and one from the "Herald," both purporting to be the same date.

A. Yes, sir.

(Testimony of John M. Sands.)

Q. Are these the only clippings that you say that you saved?

The REFEREE.—He said that they are the first.

A. They are the first.

Q. Were these sent you by the Dake's Company?

A. I have nothing from Dake's. I don't know whether they made any reference to it at all in their report, but the reason I referred to the Dake's was that I prior testified here that we were not a subscriber to any clipping bureau and I have informed myself along that line and want to correct my testimony.

Q. You don't know whether they did send you any clippings or not?

A. I have no knowledge of it. The Dake's Clipping, well, they would not come before me; that would be cut out by someone in the office and if they had any reference to it they would be filed in that particular reference. If I ever had occasion to go to a particular file, sir, if I had occasion to go there, well, I would find it there.

Q. You have examined the files of the Dake' Clipping Bureau under the heading of Cleveland Oil Company?

A. No. You see, each day, if they come in and have reference to any particular company, you see, why I would not [66] see that clipping unless I had occasion to go to that file—

Mr. WHITAKER.—What counsel is seeking to find out is this: as to whether or not you had looked among the files of the Cleveland Oil Company and

(Testimony of John M. Sands.)

found any other clipping except those.

A. None other; those are all that were in the files.

Q. (By the REFEREE.) And all the other clippings that do not refer to any particular case are destroyed? A. Yes, sir.

Mr. CRENSHAW.—I would like to introduce these in evidence.

The WITNESS.—I wish to explain that while I have testified as to the “Times,” the “Times” is the paper that I read, and the only one that I subscribe for, and so with the other clippings from some other paper, it must be that somebody else takes that paper, and clipped those out.

Mr. CRENSHAW.—I do not understand that you clipped these yourself.

The REFEREE.—The clippings will be marked Trustee’s Exhibits 3 and 4.

Mr. CRENSHAW.—Well, now, there is information I want to get. It is a question of evidence as to whether or not I will be permitted to introduce copies of the daily papers in evidence, and I would like to find out before the noon adjournment if it will be admissible as the only ones that we can get are in the library, and I want to avoid the inconvenience of bringing them here if they are not ruled to be admissible.

Mr. WHITAKER.—Do you desire now to make an offer? [67]

Mr. CRENSHAW.—Yes.

Mr. WHITAKER.—To which we object that such articles would be utterly incompetent, irrelevant and

(Testimony of John M. Sands.)

immaterial, not binding in any respect upon the R. H. Herron Company, the respondent to this citation, and especially not binding if it cannot be shown, and I think it is not shown that Mr. Sands, who is the witness on the stand at this time, read those papers and the articles contained therein relating to the Cleveland Oil Company.

Mr. CRENSHAW.—He has testified that he does read the “Times” but he could not remember on what date he had read it.

Mr. WHITAKER.—Why don’t you ask the question as to whether or not he remembers reading, outside of those clippings, any other item at all about that certain time, relating to the financial condition of the Cleveland Oil Company.

The REFEREE.—He may not want to ask him that question; he may not want to be bound by that.

Mr. CRENSHAW.—He said when he did read the “Times” he read about the Oil Companies.

The REFEREE.—I will ask you to state your purpose in the matter so we will understand it. It is right that you have introduced the daily papers with the purpose of charging him with notice.

Mr. CRENSHAW.—If there were articles in the paper, whether he had read them or not would put him on his guard or put a prudent man on his guard—cause him to investigate—it would be proper evidence.

The REFEREE.—Haven’t you got to show that those articles were called to his attention, not occasionally that he read [68] them, but that his at-

(Testimony of John M. Sands.)

tention was called to them or that he saw them, or had opportunity to read then, at least, not the casual reading of the newspaper.

Mr. CRENSHAW.—He testified that when he read the paper the oil notes were of interest to him in his business.

The REFEREE.—Well, he says that he read only half of the papers; is there any presumption that he read that one that you particularly called for? Have you got any authority on that?

Mr. CRENSHAW.—I could not find any authority on that question.

The REFEREE.—The objection will be sustained; no proper foundation laid.

Q. Well, I will ask you, did you ever read anything in any paper during the fall of 1910 and prior to December 20, 1910, in reference to any trouble about the Cleveland Oil Company.

A. I believe that the newspaper clipping which has been presented and marked "Exhibit 3" will answer that question.

Mr. WHITAKER.—That is not the question.

Mr. CRENSHAW.—This says it is the first public notice. A. Sure.

Mr. WHITAKER.—The question is, did you—that is what he asked—before that time, did you ever read anything in the newspaper about the Cleveland Oil Company?

A. No, sir, not to my knowledge.

The REFEREE.—Did you—yes or no?

A. Not to my knowledge.



(Testimony of John M. Sands.)

Q. Did anybody ever inform you that Mr. Mushet was making [69] a report to the stockholders?

A. Not to my knowledge; no.

Q. You didn't know that Mr. Mushet's investigation was being made by the stockholders' committee of the Cleveland Oil Company?

A. Not until it became public.

Q. Well, you did know it when it became public?

A. Of course I seen it in the paper.

Q. The question is whether you knew that Mr. Mushet was making the investigation.

A. Only as I seen it in the paper.

Q. Did you see that in the paper? A. Yes, sir.

Mr. WHITAKER.—You had better be specific about it, when you saw it.

The REFEREE.—The question is not what you saw, but whether you knew what he was doing there. Did you know that he was making an investigation?

A. I had no knowledge of it until it became public.

Mr. CRENSHAW.—He says he had no knowledge until it became public.

The REFEREE.—You asked him the question and I tried to make it explicit, did he have any knowledge that Mr. Mushet was investigating the affairs of the company for the purpose of making a report.

The WITNESS.—Not until it became public.

Q. (By the REFEREE.) Until what became public, the report of the fact that he was investigating?

A. Wait; I will have to think about that. I didn't charge [70] my mind with it. The only knowl-

(Testimony of John M. Sands.)

edge I had of it was by reading it in the newspapers. I cannot state that date, and that is what I meant by saying when it became public.

Q. Do you understand my question? It is, was it the fact that he was making the investigation that became public, or the report itself?

A. No, the report itself.

Q. (By the REFEREE.) That is what we want to know. Well, then, he made the report on the 21st of November, and that was made public at that time, prior to that time you didn't know anything about it?

A. Exactly.

Q. You didn't read anything in the paper to the effect that the stockholders' committee had been appointed to go into the affairs of the company?

A. Not until I seen it in that article—

Q. (By the REFEREE.) This was dated December 20, 1910? A. Yes, sir.

Q. Did you ever watch the stock quotations, did you get the stock exchange sheet down at your office?

A. No, sir.

Q. Did you ever watch the stock quotations?

A. I never did.

Q. Do you know what the stock of the Cleveland Oil Company was selling for?

A. I testified at the first hearing that I had no knowledge of what the stock was selling for, but in looking over the papers which are presented here, I find in one letter that I made reference as to what the stock was selling at. [71]

(Testimony of John M. Sands.)

Q. Can you produce that letter? (Letter produced by witness.)

The WITNESS.—I wish to add that I could not interpret the stock sheet if it was presented to me; that is why I testified as I did at my first hearing.

Mr. CRENSHAW.—We offer this in evidence.

Mr. WHITAKER.—No objection.

The REFEREE.—It will be Trustee's Exhibit No. 5.

Mr. WHITAKER.—I would like later on to withdraw these papers and file copies; they can be gone over either by yourself or Mr. Crenshaw.

Mr. CRENSHAW.—That will be satisfactory.

Q. At the time the officers of the Cleveland Oil Company were arrested by the United States Postal Authorities were you familiar with that, did you know about that?

A. Why, I knew that by reading it in the print.

Q. You saw that in the papers and read about it?

A. Yes, sir.

Q. (By the REFEREE.) Is this paper signed, is that Mr. Sands' signature?

Mr. WHITAKER.—Yes.

Q. Did you make an investigation of the affairs of the Cleveland Oil Company? A. I never did.

Q. Did they ever furnish you a statement?

A. No.

Q. Can you furnish for us the last credit that was given to the Cleveland Oil Company?

Mr. WHITAKER.—I think it is on the statement

(Testimony of John M. Sands.)

which is [72] already in evidence here, Mr. Crenshaw.

A. It was December first, 1910, credit for pump returned, \$300.00.

Q. Now, what was the last debit?

A. The last debit shown here was November 15, 1910, for \$2,607.43 which is—let me see what that was for. I believe I find the bill here; I may get it there. That was cash to protect the note.

Q. Can you tell from your statement here when was the last time that you sold them any goods and gave them any credit for it?

A. September 26th, 1910.

Q. (By Mr. WHITAKER.) How much?

A. On that day there was \$40. They were purchasing right along, nearly every day. Every few days that month and at least half of the days in August and it appears almost every day in July of the same year.

Q. What was the total of the purchases during the month of September, approximately?

A. \$65.54. In the month prior to that it was \$2,920.76.

Q. In July?

A. In July the merchandise purchased was \$3,547.23.

Q. You say September 26th was the last?

A. Yes, sir.

Q. Was the last day that they purchased any goods? A. Yes, sir.

Q. Do you know whether there were any more

(Testimony of John M. Sands.)

goods purchased by the Cleveland Oil Company from your company? A. The records do not tell. [73]

Mr. WHITAKER.—He is asking you if you know. (Question read by reporter.)

Q. After September 26, 1910?

A. Well, I don't know. Perhaps I could ascertain by refreshing my memory in that regard.

Q. I will ask you to refresh your memory. Have you that correspondence?

A. Yes. Why, we considered at that time they *they* were owing us quite a considerable sum, and, of course, like other creditors, they reached the period where they should either increase or decrease. At that time, we thought that we had given them—that they were up to their limit of credit.

Q. Isn't it a fact that you practically cut off their credit on the last of August?

The REFEREE.—Mr. Mushet telephoned that he commenced work on the report, on the investigation, on the 26th day of October, and continued until the 21st day of November.

A. It was not. They were privileged to call at our store at Bakersfield, Taft and Maricopa and buy supplies for emergency requirements, and if they wanted anything in excess of the emergency requirement they were then to communicate with the Los Angeles office.

Q. Did they ever make any request for anything except emergency equipment after the last of August that you know?

A. I don't think that they asked for anything other



(Testimony of John M. Sands.)

than emergency requirements after that date. The reason was, perhaps, that they did not require it.

Q. Now, can you tell me at what time you did cut off [74] their credit except for emergency equipment?

Mr. WHITAKER.—I didn't understand, Mr. Crenshaw, that the witness has so testified. He has testified that they had local credit and any other credit they were to communicate with the Los Angeles office.

The WITNESS.—I can present this letter.

Mr. CRENSHAW.—Very well.

The WITNESS.—It is dated the ninth month and twenty-first day. That gives them orders for large requirements to call on the Los Angeles office.

Q. (By the REFEREE.) That is the notice that you gave? A. Yes, sir.

Q. (By the REFEREE.) Whom did you give that to?

A. That goes to the different stores, when men in the field make demand for supplies.

Q. (By the REFEREE.) What information did you have and act upon when you sent that letter?

A. None, other than the account itself.

Q. That is not a very large account, is it, for a prosperous oil company to be running?

A. It represents \$1,500.

Q. Well, at the time this letter was written—

The REFEREE.—Do you want to offer that in evidence, Mr. Crenshaw?

Mr. CRENSHAW.—Yes.

(Testimony of John M. Sands.)

The REFEREE.—It will be Trustee's Exhibit No. 6.

Q. September 21st, what was the amount of the account?

A. September 21st, I will tell you. It was just what it was, less the purchases in September; it would represent, of [75] course, \$14,750 in round numbers.

Q. Is that a particularly large account for an oil company which was doing a prosperous business?

A. Well, it is so considered.

Q. Don't you carry a great many larger accounts on your books than \$14,000?

A. Well, in cases where the property, or the assets of the company are more.

Q. Then you did know something about the assets of this company? A. From information gathered.

Q. What information was that, and where did you get it?

A. I seen their property in the Kern River field.

Q. You went up and looked at it yourself?

A. Yes; I went by the property, and they had quite a number of wells dug there. I don't recollect how many. They seemed to be in a very prosperous condition; they were all in where there were producing oil wells, and, in addition to that, at this particular time, this company had a lease on what was, and is, considered a very valuable piece of oil territory, as I understand it, in the Midway field.

Q. What lease was that?

A. I can't recall the section, but it was being oper-

(Testimony of John M. Sands.)

ated, I believe, under the name of the Cleveland Oil Company, if I recall correctly. I did not visit this Midway property, but if I recollect correctly it is in the same location as the property of the Buick Oil Company or in that neighborhood.

Q. Did you receive any information between the time that [76] you looked at the property and the 21st of September that they did not have that lease and would not operate that property?

A. I did not.

Q. In other words, when you wrote them this letter their company, so far as you know, was as prosperous as it was at any time in its existence?

A. To the best of my recollection and belief.

Q. And you considered it a prosperous oil company? A. I so considered it.

Q. But at the same time you withdrew the credit?

Mr. WHITAKER.—You are using a statement, or making a statement, which the witness has not testified, that they withdrew the credit, it was not that but that with large orders the Los Angeles office had to be first consulted, and I think we will show that that is the universal custom in all that country.

Q. Previous to this notice, how much credit was the Cleveland Oil Company permitted at your different stores?

A. Credits are determined under conditions of the account at the time the requisitions are demanded. You can't have in a credit department a letter issued in January that would provide for November, and I make mention of this to show you that it is custom-

(Testimony of John M. Sands.)

ary that there should be but one head to a credit department.

Q. I will ask you the question in a different way, previous to September 21st, where was this goods that was purchased by the Cleveland Oil Company, purchased?

A. Previous to September first the purchases [77] were at times made in Los Angeles and at other times in the field, if they were large requirements they generally were made in Los Angeles, because it is customary.

Q. Well, did they purchase goods of your stores in the field without consulting the Los Angeles office?

A. Under instructions from us at different periods.

Q. I see you limit them in this notice of September 21st to \$50. Did you ever place any limit on them before that time?

A. I would have to look over the papers to see.

The REFEREE.—Look and see.

A. I see here letter of date August 5th, where one of our managers writes in that he is delivering goods to the Cleveland Oil Company in small quantities almost daily and wanted to be advised when we expected a settlement from them. He states that the amounts are not large but have exceeded the \$100 named in your letter of the 22d, of the month prior.

Q. That is the 22d of July?

A. Yes; you wouldn't hardly think that the company—

The REFEREE.—Just answer the question.

Q. Your managers were delivered a notice about

(Testimony of John M. Sands.)

July 22d that they were to permit the Cleveland Oil Company to buy goods only to the limit of \$100 from the company?

A. No, it was asking for information.

The REFEREE.—He says, Mr. Sands, that there was a \$100 limit put upon it upon July 22d, have you got the letter of the 22d?

A. The next letter will show it—no, it is dated August 6th (reads): “Confirming our telephone conversation [78] of yesterday, you have the privilege of delivering the Cleveland Oil Company 1100 feet of 8 $\frac{1}{4}$ ” 28# casing. This is granted for the reason that they are to pay us its equivalent in cash to-day.” I won’t say whether we got the cash, we had the promise anyway.

Q. No cash after August, August 6th?

A. We didn’t get any cash after that until September 15th, so I can’t tell whether that is the cash that we were to get or not.

Q. Did they give you a note in August?

A. No, there is a note on the 22d day of August that we paid and charged to them. There is where we paid and charged (witness indicates) September 10th there was another note of \$4,000.

Q. What do you mean by you paid those notes and charged them to them?

Mr. WHITAKER.—I understand the witness means that when a company makes a note they put it in the bank and then when it becomes due, if the company does not pay it, they take it up and charge it back to the company; is that correct, Mr. Sands?



(Testimony of John M. Sands.)

A. Yes, sir.

Q. These notes, the first one was paid by you, you say, on August 22d?

A. I see one note was paid by us on August 22d.

Q. That was a note of the Cleveland Oil Company which was placed in the bank? A. Yes, sir.

Q. Do you remember what bank? [79]

A. No, I don't recollect.

Q. Have you got that note in your possession?

A. I have reason to believe it is filed here.

Mr. CRENSHAW.—Do those show that they have been deposited in banks?

The REFEREE.—Yes, they show the date of their payment.

Q. (By Mr. WHITAKER.) What was the amount of the note?

A. The amount of the note was \$2,911.17.

Q. Do you know whether or not the bank made any demand upon the Cleveland Oil Company for the payment of that note?

A. I could not tell you. I believe I cannot answer your question.

Q. I say, did the bank make a demand on the Cleveland Oil Company for the money?

A. I have no way of knowing this particular note.

Q. Were they placed in the bank for the purpose of the bank collecting them, they were put there for the purpose of collection, were they not?

A. Oh, yes.

Q. Why were they returned to you?

A. Because it was necessary to protect them.

(Testimony of John M. Sands.)

Q. That is just what I am getting at. Did the bank fail to collect them from the Cleveland Oil Company?

A. They must have, or they would not have made a demand upon us.

Q. Did they state their reason when they made the demand?     A. No.

Q. But they would not have made the demand unless they had made an effort to collect them and had failed? [80]

A. I don't know what the bank's custom is of collecting its notes.

Q. Did you get the commercial report from Dun or Bradstreet?

A. We were a subscriber at this particular time to Dun's.

Q. Have you got any report in regard to the Cleveland Oil Company?

A. No, not to my knowledge.

Q. Have you those reports on file in your office?

A. They would be right here if we had any.

Q. (By Mr. WHITAKER.) In other words, what you mean is that if there were any reports relating to the Cleveland Oil Company it would be among those papers.

A. Yes, sir; so it is certain that they did not send us any.

Q. Did you ever get a report from any local company?     A. No, I had no occasion to.

The REFEREE.—We will adjourn until 2 o'clock.

Mr. CRENSHAW.—Mr. Whitaker, during the in-

(Testimony of John M. Sands.)

terim, will you kindly bring the original notes of which these are copies? The referee would like to have them.

The WITNESS.—You have some originals and a lot of copies. [81]

July 24th, 1912, 2 o'clock P. M.

JOHN M. SANDS, on the stand.

Direct Examination Continued.

(By Mr. CRENSHAW.)

Q. Now, Mr. Sands, do you know what date those checks were returned? Can you tell from your letters?

A. I think from the records there—well, I have nothing here on file as to the date the notes were returned. It could be ascertained.

Q. You testified concerning it in your previous examination by stating the teamsters' bills would indicate that, and the teamsters' bills were made a part of the record.

A. You see later; I know the date shows here (indicating). But I can't find out from the index what dates show.

Q. Did you have any correspondence with your manager here?

A. That letter which is on file as an exhibit is the only letter I could find.

Mr. WHITAKER.—Look at this and see if it will refresh your memory. (Counsel produces letter.) I think this tells it exactly.

A. This is a letter from our manager at Taft. It says, "The Cleveland Oil Company returned the

(Testimony of John M. Sands.)

pumps of which you wrote this morning. One of them is pretty badly stripped of parts.” And so on—that is on November 25th.

Q. That was on November 25th? Then that credit which appears for the pump on December first is for those pumps written of in this letter? [82]

A. Yes, sir; yes, sir.

Q. The property that was returned about the 31st day of October and for which it appears they were given a credit of \$2,823.37, what was that?

A. That was the casing.

Q. That was the casing? A. The casing.

Q. And a payment was made on account to the R. H. Herron Company in September—

A. It was about September 15th, \$2,000.

Q. Do you know who paid you that cash?

A. I suppose—

Q. Was there any agreement between you and them to the effect that they would pay you the \$2,000 at that time?

A. Why, they had been promising cash for several weeks.

Q. Was the amount agreed upon, what they should pay at that time?

A. I am not positive concerning it. I believe that these letters which we have here indicate a certain sum of cash that they were to pay.

Q. Is that the money which was to come from Dr. France?

A. I can't tell where they got the money to pay this, but of course most of my assurances were from

(Testimony of John M. Sands.)

Dr. France, and whenever I would make a demand upon them, why that demand would naturally reach Dr. France.

Q. Did you have any correspondence with Dr. France about it?

A. I think there is some there among those papers. I remember of writing him. [83]

Q. Why did you go after Dr. France and didn't go after the company for your money?

Mr. WHITAKER.—That is objected to as incompetent, irrelevant and immaterial, the question as I understand it, and I think your ruling is absolutely correct on that, that this narrows it down to whether the Herron Company or Mr. Sands had reason to believe that he was receiving a preference at the time that these payments were made and that the company was not solvent. The mere fact that he had communicated with one of the members of the company who had strengthened the account by giving a personal guarantee would not affect the rights of the Herron Company in any way.

Mr. CRENSHAW.—It seems to me that it is more or less material as to why he should go after Dr. France and not attempt to collect his money from the company. Those reasons would throw some light on what he knew about the finances of the company.

Mr. WHITAKER.—To which we would answer, with all due respect to counsel, that if a man has a claim against a corporation and it is guaranteed by any person, he has a right to go after either one, and



(Testimony of John M. Sands.)

the fact that he goes after one cannot affect the liability of the other in any way. We will take a ruling, Mr. Referee, on that.

The REFEREE.—I don't see what difference it makes whether he should seek one or the other. If it was the other way—if the surety got a benefit, why it could be recovered just as much one way as another because the statute is that the person to be benefited is the one that recoveries may be had from. I don't see why, if a man has two persons [84] to go to and he chooses to take what he can from one, I don't see why that would show cause to believe that he was getting a preference.

Mr. CRENSHAW.—Isn't that a reason—wasn't there any reason why he should go after Dr. France instead of the Company—

The REFEREE.—He didn't go after Dr. France.

Mr. CRENSHAW.—I understood that his testimony was that he attempted to collect his money from Dr. France.

The REFEREE.—I didn't understand that.

Mr. WHITAKER.—He testified that he communicated with Dr. France with reference to getting this money, and that he had Dr. France's personal guaranty.

The REFEREE.—I understand that when the goods were sold that Dr. France had negotiated the sale, and that Dr. France said that he would see that the bill was paid, but I don't understand that after that this witness or the Herron Company ever made any demand on Dr. France for the money. Is that

(Testimony of John M. Sands.)

a fact?      A. Yes, sir.

The REFEREE.—You never demanded of Dr. France the money at all?      A. No, sir.

The REFEREE.—Objection sustained. Do you want an answer to your question?

A. No, I understood the witness to testify differently.

The REFEREE.—I see what you mean, but that is the way the testimony was.

Q. Well, now, all the communication you had with Dr. France [85] regarding this money was as an officer of the company and not on his personal guarantee?

The REFEREE.—Answer the question.

A. My communications are all addressed, I think, to Dr. France as president of the company and they are here, all my letters from him and to him.

Q. You had a written guarantee from him—

The REFEREE.—According to the testimony there is no liability upon Dr. France to him at all; it was an obligation so far as it goes here to see that it was paid.

Mr. CRENSHAW.—It shows no—

The REFEREE.—They had a written personal guarantee, according to this testimony.

Mr. CRENSHAW.—That testimony is not competent.

Q. Did you have a written personal guarantee from Dr. France?      A. We did.

Q. On this account?      A. We did.

Q. And you made no attempt to collect from him

(Testimony of John M. Sands.)

on account of the written guarantee?

Mr. WHITAKER.—Up to what time? I will state that after the company was adjudicated a bankrupt and long after that there was an attempt made.

Q. Up to the time of the adjudication?

A. I know that we wrote him as president of the company—I don't recollect—but the letters are here as evidence, everything that passed between us and we could soon arrive at a date by looking at these papers. [86]

Q. What time did you get that guarantee?

A. It was about the time that the company was formed. Just after the company was formed.

The REFEREE.—Have you got that guarantee there?

Mr. WHITAKER.—No, he has not the guarantee here, but I have no objection to the witness producing the guarantee. Where is that guarantee?

A. Judge Money, I may have given it to him.

Mr. WHITAKER.—He is not here.

The REFEREE.—Well, he is not in the city.

A. No, Judge Money is an attorney at Columbus, Mr. Helm.

Q. Do you know what the contents of that guarantee is?

A. I could not give the exact wording, although it was sufficient to guarantee what deliveries were made to the Cleveland Oil Company.

Q. It was not on your regular form?

A. No, sir, it was not on the regular form.

(Testimony of John M. Sands.)

Q. How long previous to this \$2,000 payment made on September 15th did they make you any payment of any considerable amount? Will you look at your sheet there?

A. Let me see; now, there is a cash payment on September 15th, 1910.

Q. That is the payment we are referring to, at least \$2,000.

A. Here is one, check 1869, to cover note due August 9, 1910, notes received \$1,500. No—I have got that wrong the date was August 6, 1910.

Q. How much? A. \$1,500. [87]

Q. Well, you carried on the negotiations with the officers of the Cleveland Oil Company in regard to this account and the payments made on them.

A. Yes, sir.

Q. Did anybody else take that up with them at all for your company? A. Not that I can recall.

Q. Whom did you have your negotiations with of the Cleveland Oil Company, what officer?

A. At times with Dr. France, and generally with him.

Q. With Dr. France? A. Yes, sir.

Q. Was he here in August and September?

A. I doubt whether he was or not from these notes.

Q. Well, when Dr. France was not here, whom did you take it up with?

A. Why, Mr. Thomas Montgomery and Mr. Batchelder.

Q. Well, when you went up to see about getting payment on this account, it was growing rather

(Testimony of John M. Sands.)

large; what did they tell you?

A. Well, they were expecting money soon.

Q. Did they say where from? A. No.

Q. Well, how soon after that did you get any money, after the conversation where they told you they were expecting it soon, can you fix the time?

A. Why, it could not have been very long, because there is payments here pretty nearly every month; it was quite an active account. [88]

Q. With reference to the return of the material, when did you first have a conversation with the officers of the Cleveland Oil Company concerning that?

A. I think it is prior, I think, to the delivery of it to us, and that was delivered in October.

Q. Did you accept that material because you thought you were getting a big bargain in getting it back?

A. Not at all. We accepted that material because it is quite customary to accept the return of second-hand material.

Q. Was the price you gave them credit for a good price for the material? A. It certainly was.

Q. You considered it a big price.

A. I considered it more than a fair price.

Q. More than you would have gone on the outside and taken it for?

A. I won't state that. I would consider it a fair price.

Q. Whom did you have the conversation with about taking back that material?

A. Why, Mr. France.



(Testimony of John M. Sands.)

Q. That is E. France.

A. Yes, E. France, and Mr. Batchelder was present at one time when I was talking to Mr. France about it. Most of my conversations were with Mr. France, although I recollect there were others present.

Q. Tell us how it arose, the proposition that you were to take that material, the circumstances.

A. They stated that they had no use for the material and would be very glad indeed if we would receive it as a credit [89] on account, if we could use it. I told him that we could use it at a price.

Q. Well; they told you that they could not give you the money?

A. At that particular date; yes. They didn't have the money; they were expecting money.

Q. Did they tell you how much they were expecting? A. They did not.

Q. They did not tell you how they were going to get it? A. They did not.

Q. Simply told you that they were expecting money? A. Yes, sir.

Q. Can you fix any date when you were up there?

A. I can safely say it was during October.

Q. It was during the month of October?

A. Yes, sir.

Q. How many times were you up there?

A. Two or three times at least.

Q. Did you notice when you were up there on those occasions during the month of October, or were you aware of the fact that Mr. Mushet was making an

(Testimony of John M. Sands.)

examination of the books?

A. I had no knowledge of that.

Q. You had no knowledge that the stockholders were investigating the account?

A. I had no knowledge of it.

Mr. CRENSHAW.—Did you find those letters to Dr. France?

Mr. WHITAKER.—There is quite an aggregation of letters here. Some refer to the France Oil Company and some to the [90] Cleveland Oil Company. I am trying to sort out those which refer to those dates. I was going to show them to the witness afterwards, they don't seem to be in chronological order.

Q. Mr. Sands, at the time you agreed to take back this casing, you didn't think this was a very good account, did you?

A. I always thought it a good account. I had no reason to feel otherwise about it.

Q. I said, did you still consider this a good account? A. I certainly did.

Q. When did you first commence to consider it a bad account?

A. I never considered that there was any question or doubt in regard to the account at all. That didn't come up, so far as that is concerned, until the trouble with the postal authorities—the bankruptcy proceedings.

Q. I believe you testified this morning you knew that their stock was going down very rapidly, the market value of it.

(Testimony of John M. Sands.)

Mr. WHITAKER.—No, he didn't testify; he said a letter which is in evidence.

Q. You were aware of the fact?

A. I think very likely I made reference to the value of the stock at that particular date. I never determine things by stock value in that way and I was quite surprised to see that I had mentioned it.

Q. Did you make any investigation at any time as to the properties the company had at that time?

A. Prior,—it was quite a while, anyway. [91] As to their property in the Midway there.

Q. You saw the original property they started out with?

A. Well, yes, of course they kept improving those properties.

Q. Do you know what their daily or monthly production was at that time?

A. Every time I would, as I say, drop in and meet Dr. France, he would mention the production, just what it was during the previous month.

Q. Were you aware of the facts that the company declared a dividend in July or that they passed the dividend? A. No, I had no way of knowing that.

Q. Did you have any correspondence or were any matters taken up through letter?

A. On what subjects?

Q. Any of these negotiations carried through correspondence.

A. You mean about the return of these goods?

Q. And the payments on their account during the last few months?

(Testimony of John M. Sands.)

A. Well, if I had, the letters are here present, every letter we have.

Mr. CRENSHAW.—I think that there was a letter this morning that we were looking for, dated some time in July, instructions to his manager at Moron.

Mr. WHITAKER.—I can't find that letter, Mr. Crenshaw. Here is the letter of August 6th, Mr. Crenshaw, addressed to his manager; it has a little bearing on the question you are asking about. [92]

Mr. CRENSHAW.—I would like to introduce that in evidence.

Mr. WHITAKER.—No objections.

The REFEREE.—It will be Trustee's Exhibit No. 7.

Q. Do you know the occasion of your writing that letter?

A. Yes, it stated that they were owing us about \$20,000.

Q. Did you ever make any inquiry? Did you place these in the bank yourself?

A. Yes, these notes indicate that they have been discounted.

Q. I say, did you place them in the bank yourself?

A. Oh, yes, we discounted them.

Q. At the bank? A. Yes, sir.

Q. And they were guaranteed by you?

A. Oh, yes.

Q. Did you try to discount them at the bank without your guarantee?

A. Why, it is necessary, you endorse a note, you

(Testimony of John M. Sands.)

guarantee it to the bank. Some people endorse them without recourse.

Q. Did you endeavor to discount them at the bank without guaranteeing them?

A. Why, not generally; it is not customary to do like that. That is the form.

Q. It can be done occasionally and is done?

A. If the bank takes them.

Q. Well, these notes were returned to you directly after they became due.

A. Yes, sir; we had to protect these notes. I say, we had to protect them. They show on their faces what time they were [93] due, otherwise they would have been protested.

Q. What did you do when these notes became due—took it up with the Cleveland Oil Company?

A. Oh, yes.

Q. Did they give any reason for not paying their notes when they became due?

A. The only reason was that they had been disappointed in not receiving their money in time to protect these.

Q. They admitted the fact that they did not have the money to take them up when they become due?

A. Well, that particular date; yes.

Q. Did they say if the bank had brought them around a few days afterward that they would have got the money?

A. Well, I don't recall any such conversation.

Q. Did they ever give you any checks which were



(Testimony of John M. Sands.)

not good?      A. No.

Q. Did they ever give you any checks which they paid at a later date?

A. No, they never gave me a check but what was good; always paid on demand.

Q. Did they give you any checks and ask you to hold them?      A. They never did.

Q. Were all the moneys that were paid by them paid by check? That is, the larger amounts—I mean, were they paid by check?

A. To the best of my knowledge, this record will indicate just how we got the money every time.

Q. Will it indicate as to whether it was cash or not?

A. Yes, sir; you see that says “paid by check.”

[94]

Q. Now, I will show you this item of December 31st, “Cash to apply check #265.”

A. That is the number of their check.

Q. What does that wording mean?

A. Why, that means exactly what it states, that the cash represented by the check is credited to the account.

Q. That did not mean that they paid you cash to apply on a check that they had previously given you?

A. No.

Q. It might mean that, might it not?

A. Not in that way—

Q. Is that the particular form to say, “Cash to apply check”?

Mr. WHITAKER.—We object to that question.

(Testimony of John M. Sands.)

The REFEREE.—Objection sustained.

Q. Do you know what those words mean, can you explain it?

A. It means that it was cash represented by Check #265 that was credited to the account.

Q. Do you find any similar items on the account to that?

A. There is the same thing (indicating), “Cash on account interest on note.” Now, let me see—you see here (indicating) “Cash to apply \$2,000” and here “received check #1398 to cover.” Every man has a particular style of his own, for which you know I cannot be responsible.

Q. I understand that. Did you ever receive any checks from anybody else on this account, outside of the Cleveland Oil Company? Any personal checks, that you know of?

A. Not that I can recall. [95]

Q. Did Dr. France ever pay anything on it at all, personally?

A. Not that I can recall. If that is essential I would be glad to have my clerks look up the record and furnish it to you. I don't recollect it.

Mr. CRENSHAW.—Have you found the France correspondence yet?

Mr. WHITAKER.—I am getting it right now.

Q. I believe you testified this morning that you got no report from Dun & Company on the Cleveland Oil Company?

A. I testified there was none in this record and if there had been one it would have been in this record.

(Testimony of John M. Sands.)

Q. You didn't make any further search.

A. No, because that is the only record that we have; there was nowhere to search.

Q. Your Dun report would go in there if you had gotten one?      A. Yes, it would have.

Q. Did you ever request from Dun & Company a special report at any time on the Cleveland Oil Company?      A. Not to my knowledge.

Q. Then, at the time that these notes were not being paid at the bank, you didn't make any investigation of the affairs of the Cleveland Oil Company?

A. These notes, if you follow the records here closely, I believe you will find each and every note had a good and substantial payment thereon and that the account was active; it was not a dead account. They were buying goods right along.

Q. Along here in August, they owed you about \$20,000, didn't they? [96]

A. They did when I wrote that letter. I don't know what the date is.

Q. Isn't it a fact that most of these notes were due after August?

A. Here is a note due in November; and this is another one, due four months after June 23d; and another one four months after May 23d; and another ninety days after May 23d.

Q. What is the total amount of payments received on those notes? Does it show?

A. It shows that casing was returned that was credited on the note due August 21st and then there was a payment in cash as well, September 15th, that

(Testimony of John M. Sands.)

was to apply on the note due September 10th.

Q. Was there any other casing returned?

A. No, that is all of the casing that was returned to us. As I remember it, there was some other casing in the field; what became of it I don't know. I know this, that in talking with our man in the field at the time, he stated that there was some in the field that we could not use to advantage. I said, "Well, we won't buy what we can't use to advantage." What became of that casing that we could not use to advantage I don't know, we credited up just such casing as was hauled to us, and we paid for the hauling.

Q. Did you ever ask of the Cleveland Oil Company any security for any notes?      A. No, sir.

Q. You considered, however, that you had security in Dr. France's guarantee?    [97]

A. I considered that we had security in the property, and as an additional safeguard, we had Dr. France's guarantee.

Q. What particular piece of property was it that you considered valuable?

A. Their property in the Kern River field was, according to conversations I had with Dr. France, yielding good productions, and I have gone over the property that they had at the Midway field, and it had more than a prospective valuation; it was adjoining the Buick Oil Company property, which is one of the best properties, we understand, in the State; it joined that.

Q. At that time, the Buick was not producing, was

(Testimony of John M. Sands.)

it? A. I am not certain.

Q. As far back as 1910?

A. I am not certain as to whether it was producing oil or not. Just at that particular time, I don't know whether those wells were producing. The trend of development was in that direction and valuations were high in that direction.

Q. Do you understand that as late as September and October, 1910, that they still had this valuable property up in the Midway field?

A. Yes; I knew that they had this property up there.

Q. Did you understand that they had a lease on it?

A. I was not certain as to whether it was a lease or whether they purchased it outright.

Q. About all you knew about it is what Dr. France told you about it?

A. Other than as to the location.

Q. I mean, he told you about the ownership of the company? [98]

A. Yes; but then I know as to its location. I consider the property valuable.

Mr. WHITAKER.—These are all of the letters pertaining to the Cleveland Oil Company. I would suggest that you keep them in chronological order, Mr. Crenshaw, because I am going to put them in evidence, every one of them.

Mr. CRENSHAW.—These old letters of 1909 are not material.

Mr. WHITAKER.—I think that they are very material. We are going to offer them, put them in the record.



(Testimony of John M. Sands.)

Mr. CRENSHAW.—You say all of these letters are going in, Mr. Whitaker?

Mr. WHITAKER.—Yes, every one of them.

Q. I will show you this letter, Mr. Sands, which is dated August 25th, the personal guarantee of W. A. France and G. G. Gillette, of a note for \$5,055.00. Please give me the circumstances of obtaining that guarantee from them. Why it was done?

A. This is an instance where they had asked for an extension. You see it states here clearly.

Q. Did you ever attempt to collect that note from Mr. Gillette, or was it paid by the Cleveland Oil Company?

A. Now, when that came due, December 31st, 1909, they paid \$3,000 on that.

Q. You mean the company?

A. It says, "cash to apply check #255." It must have been the company's check. Of course, I could easily ascertain.

Q. So far as you know, it was the company? Do you know whether the balance of the note was ever paid or not?

A. Yes, I can tell here in a moment. On February first, [99] they must have paid that according to that record. February 1, 1910, that record says that Check #1296 to take up note \$2,055.42, due February 28—and this note of February 28th is part of that note of December 31st, 1909, about which you inquired did we ever get the settlement.

Q. Mr. Sands, did you investigate the financial responsibility of Mr. France, at the time that you con-

(Testimony of John M. Sands.)

sidered this line of credit?     A. I did.

Q. What did you find?

A. I found that he was a man of considerable means, considerable property; there is letters here from the president of a bank here in this city, Mr. M. J. Monette, telling what he thinks of Mr. France.

Q. Do you know, October first, 1910, the occasion of writing that letter?

A. I don't know the occasion, because it was written in Columbus, Ohio, and I was here.

Q. Do you know whether that is a reply to any letter you had written?

A. No, only just an acknowledgment on his part that he had been personally responsible up until that date, October first, 1910.

Q. Upon receipt of that letter by you, did you make any investigation of the affairs of the Cleveland Oil Company?     A. No investigation.

Q. Notwithstanding the fact that he informed you that he would no longer be responsible and was not an officer?     A. There was no necessity. [100]

The REFEREE.—That is not the question.

Q. Did you ever make any investigation of the affairs of the Cleveland Oil Company after that date?

A. No, not to my knowledge.

Q. Will you examine this letter, dated November 5th, 1910, addressed to you by W. A. France—does it recall to you the letter to which that was a reply, which is referred to?

A. Why, no; my letter of November 5th should be here.

(Testimony of John M. Sands.)

Mr. WHITAKER.—You have not got that, I looked for that.

Q. Do you remember the contents of that letter?

A. Why, I can't remember the contents of that particular letter, only I know that he would have only one occasion to write to me and that was as he was president of the company, and my arrangements had been made with him.

Q. Do you remember whether in that letter you said anything to him about his own responsibility for the debt?

A. I cannot recollect, because I have not the letter here.

Q. Well, did you at any time try to collect any money from him on a personal account?

Mr. WHITAKER.—We object to that as already asked the witness and answered, and I put in "prior to the time of the adjudication" and the witness answered, "No."

Mr. CRENSHAW.—It is simply for the purpose of checking the account; this letter may refresh his memory.

The REFEREE.—Answer the question.

A. Not to my knowledge.

Mr. CRENSHAW.—I think that is all.

Cross-examination.

(By Mr. WHITAKER.) [101]

Q. Mr. Sands, how long have you been the manager of the R. H. Herron Company in California, approximately? A. Seven years.

Q. And during all of that time have you had charge

(Testimony of John M. Sands.)

of the credits of the company?      A. I have.

Q. During any of that time, did any of the district managers, either in Bakersfield, Taft, Maricopa or any other place in California, have any authority to extend large credit to any oil company without first being authorized by you?      A. They did not.

Q. Was it, or was it not, the universal rule and custom and instruction that each of such managers was to communicate with you whenever any large order was placed in the store?      A. Yes, sir.

Q. And is the order then followed or rejected according to your judgment?      A. It is.

Q. And do or do you not notify the district managers accordingly?      A. I do.

Q. I hand you a letter, dated February 18, 1909, to the R. H. Herron Company from J. L. Scott, and ask you if that contains the report that you received as to the company's holdings.      A. I recognize that.

Q. Who is Mr. J. L. Scott?

A. He is our division manager in the Kern River district.

Mr. WHITAKER.—We offer this letter in evidence for the [102] purpose of showing the report that was made to the R. H. Herron Company by its local manager as to the properties of the Cleveland Oil Company, all holdings.

Q. Did you rely upon the accuracy and correctness of the information contained in that letter?

A. I investigated the field at the first opportunity as well.

Q. Just answer the question. Did you rely upon

(Testimony of John M. Sands.)

the correctness and accuracy of the information contained in that letter?     A. Not entirely.

Q. Did you afterwards verify it?     A. I did.

The REFEREE.—It will be Claimant's Exhibit 3.

Q. I now hand you a carbon copy of a letter dated Los Angeles, May 10th, 1910. I will ask you to state whose signature that is at the bottom.

A. Mr. Lyon's.

Q. Who is Mr. Lyon?     A. Our secretary.

Q. Was he secretary of the company at that time?     A. Yes, sir.

Q. So that, as early as May, 1909, you notified the Bakersfield office as follows: "Oil Well Supply Company, Bakersfield, Cal., Gentlemen: Do not deliver any large amount of supplies to the Cleveland Oil Company without first getting authority from this office. You may deliver to them the little things they need to an amount not over \$100 if they require it, but all purchases in excess of the \$100 specified [103] must be referred to this office." Was that in accordance with your usual custom?     A. It is.

Mr. WHITAKER.—I am going to offer all of these at once.

Q. And that is the acknowledgment of the letter, is it, from your Mr. Scott? (Counsel produced document.)     A. It is.

Q. Now, I hand you a letter, or rather a carbon copy of a letter dated at Los Angeles, Cal., June 26th, 1909, addressed to Mr. J. L. Scott, Manager, Oil Well Supply Company, Bakersfield, Cal., and ask you if that is your signature.     A. It is.



(Testimony of John M. Sands.)

Q. Did you send that letter to Mr. Scott at the time, the original?     A. I did.

Mr. WHITAKER.—We offer that as a part of this exhibit.

Q. Now, I hand you a letter dated Bakersfield, Cal., October 16, 1909, on the letter-head of the Oil Well Supply Company, signed Oil Well Supply Co., per W. C. Hill, and ask you if you received that letter on or about that date.     A. We did.

Q. The letter being as follows (reads): “John M. Sands, Manager, Oil Well Supply Co., Los Angeles, Calif., Dear Sir: We learned to-day that the Associated Supply Company have attached the Cleveland Oil Company. The Cleveland Oil Company owes the Associated Supply Company approximately \$3,000. We got this information from their former superintendent, Mr. James Jones. We give you this for your information, and oblige. Yours truly, Oil Well Supply Company, per W. C. Hill.” [104]

Q. And subsequent to the date of that letter all of these sales were made to the Cleveland Oil Company by your company, under your instructions?

A. Yes, sir.

Q. I hand you a letter of three pages, dated from Columbus, Ohio, 12/23/1909, signed W. A. France. Do you know if that is the signature of Dr. France?

A. I recognize it as such. He states in there, “We have now eight producing wells and, as near as I can get at the facts, we are getting from 8,000 to 10,000 barrels of oil per month. We have been selling our oil as fast as we could produce it, and have sold some

(Testimony of John M. Sands.)

as high as 75 cents per barrel. We have just closed up a contract with some Boston people, who, I understand are very strong people financially, for the lease of our refinery for two years; also have contracted with them for 240 barrels of oil at the rate of 65 cents per barrel, which we are to furnish them at the rate of 10,000 barrels per month. This is to use in the refinery for making asphalt. Our refinery has a capacity of 500 tons of asphalt per month."

Q. What refinery did he refer to—the refinery owned by the Cleveland Oil Company?

A. It is one that we have a contract with.

Q. To purchase?

A. No, I think they had a contract for reduction.

Q. The Warren refinery? A. I think so.

Q. Did you believe the statement contained in that letter? A. I certainly did.

Q. And you relied upon that? [105]

A. Implicitly.

Q. Is that the letter which you wrote in reply to it? The other letter being dated Los Angeles, Cal., Dec. 28, 1909. A. That is my reply.

Q. I will ask you whether this letter was sent by you, the original of it, to your house in Taft. (Counsel produces document.) A. It was.

Q. Being of date "Los Angeles, California, January 11, 1910, Oil Well Supply Company, Taft, California. Cleveland Oil Company, Gentlemen: You are privileged to deliver the above company supplies to the amount of \$1500. For anything in excess of this amount, communicate with this office. They are

(Testimony of John M. Sands.)

owing us considerable money and they have not acquired the habit of discounting their bills, which is our reason for the limited credit. Yours very truly,  
J. M. Sands."

Mr. CRENSHAW.—I think we can save a lot of time. I will stipulate that you can put in these letters.

Mr. WHITAKER.—I simply want to get them before the referee.

The REFEREE.—If you want to call my attention to any others, you may read them.

Mr. WHITAKER.—I offer a letter from Dr. France of date January 17, 1910, to Mr. Sands—let me see—a letter of January 21st, 1910, to the Oil Well Supply Company, Bakersfield, Moron, Maricopa. That was a circular letter?

A. Yes, to those three stores.

Q. Instructing the three stores that further deliveries [106] of \$1,000 for the total three stores might be allowed to the company?

A. Yes, sir. We also offer a letter, dated Feb. 9, 1910, from W. A. France to John M. Sands; also letter dated Aug. 6, 1910, to John M. Sands from Oil Well Supply Company by George W. Church, dated at Bakersfield; also letter of Cleveland Oil Company dated August 6th, 1910, to Oil Well Supply Company, advising them of enclosed check for \$1,500. Likewise carbon copy of a letter from the R. H. Herron Company to the Cleveland Oil Company, dated August 10, 1910, advising the cancellation of the note for \$3,000; also receipt for \$1,526.23.

(Testimony of John M. Sands.)

Q. Now, this casing, Mr. Sands, which has been referred to, and is referred to in the letter of August 6th, 1910, from the Herron Company to the Oil Well Supply Company, was 1100' of 8 $\frac{1}{4}$ ", 28# Casing, and that was delivered by your company to the Cleveland Oil Company?

A. That is the casing that we received back, our casing that he had sold. That letter is giving them authority to deliver the casing.

Q. Was that casing delivered by your company?

A. I will have to look here and see, because I could not tell you.

Q. This letter of date August 6th, you testified in regard to it this morning?

A. I want to get it absolutely clear. May I read that letter?

Mr. WHITAKER.—Yes. (Witness consults document.)

A. My letter of August 6th calls for 1,100 feet of 8 $\frac{1}{4}$ " inch, 28# casing, and I see there was billed on August 10th, [107] 1,109 feet of 8 $\frac{1}{4}$ ", 36# casing.

Q. That is the same thing, is it not, with the exception that it is heavier? A. I think it is.

Q. How much does that amount to, that invoice?

A. Sixteen, eighty-six, thirty-two.

Q. Now, it was agreed that this should be paid for in cash, was it?

A. Yes; this says we are to have its equivalent in cash.

Q. Well, was it?

A. I will tell you in a minute—no.

(Testimony of John M. Sands.)

Q. It was not paid in cash, but that was the agreement?     A. Yes, sir.

Q. Now, you did not receive any money according to your statement, until the 15th day of September, 1910, when you received \$2,000, I believe.

A. Yes, sir.

Q. Do you know whether that \$2,000 was intended to cover that casing?

A. It was intended to cover the casing; yes, sir.

Q. To which you have just testified?

A. Yes, sir.

Mr. WHITAKER.—We offer in evidence a note addressed to John M. Sands, San Francisco, dated Los Angeles, Cal., August 13, 1910, and signed by the secretary of the company.

Mr. WHITAKER.—Now, I call your attention, Mr. Sands, to a letter of date August 22d, 1910, and ask you who wrote that letter.

A. Mr. Lyon, our secretary.     [108]

Mr. WHITAKER.—I think that is important, so I will read it. The letter is on the letter-head of the Oil Well Supply Company and is dated Los Angeles, Cal., Aug. 22d, 1910, addressed to Mr. John M. Sands, San Francisco, Calif. Dear Sir: Had a talk with Mr. Batchelder of the Cleveland Oil Company this morning. It seems that their refinery in the Kern River Field burned down Saturday and that they are having trouble in raising the \$1,700 necessary for the 1000 feet 8 inch casing for the Kern River Field. It seems that the National sent them a car of 8 $\frac{1}{4}$ " to the Midway Field and by mistake



(Testimony of John M. Sands.)

their superintendent unloaded it and hauled it out. You know we gave them 1000 feet there and the result is that they have 2000 feet too much in the Midway field and have none in the Kern River. They have not taken care of their note due today. We are simply giving you this information that you may be in touch with the matter. Very truly yours, R. H. Herron Company, Walter Lyon, Secretary.

Q. Now, do you know whether any of this casing, that is, this 1000 feet, was any of the casing that was later returned to you?

A. Why, such casing as was returned to us was such casing as was delivered.

The REFEREE.—That is not the question. He wants to know whether that particular casing was returned.

A. I could not identify it; I would not know it.

Q. What was the size of the casing that was returned to the company in October?

A. The size of it was 8 $\frac{1}{4}$ ", but I was trying to get the weight. There are so many different weights, and it is as [109] essential to know one as it is the other, I suppose. Well, I can easily ascertain by looking at the record; there is nothing in those papers which would show.

Q. At this time, you cannot state of your own knowledge what the size and weight of the casing was? A. I can state the size, 8 $\frac{1}{4}$ ".

Q. Do you know whether or not that had been used in any wells?

A. You mean that casing that was returned?

(Testimony of John M. Sands.)

Q. Yes.

A. The casing that was returned had been used; it was so reported to me.

Q. Where?

A. By the Cleveland Oil Company.

Q. Where was it used?

A. In the Midway field.

Q. And you allowed them a credit of 75 per cent of the original cost?

A. Yes, sir, 75 per cent of the original cost.

Q. I will ask you whether or not you ever had occasion to take that casing from other companies?

A. Yes; it is quite common.

Q. Have you frequently done so?

A. Quite frequently.

Q. What is the actual amount allowed as a credit to the company, assuming that the casing is in fairly good condition?

A. Twenty-five per cent from the price of new is an exceedingly liberal discount.

Q. Is that fair as between both parties? [110]

A. Yes, it is fair between both parties.

Q. Now, I hand you a letter, or rather a carbon copy of a letter, addressed to J. L. Scott, District Manager, dated October 26th, 1910, referring to casing, as follows (reads): "Dear Sir: We haven't received any record of the casing that we arranged to have returned by the Cleveland Oil Company to the Taft store. Please advise promptly." I show you that letter and the date for the purpose of refreshing your memory about that. When was it that it

(Testimony of John M. Sands.)

was agreed that you people should take back that 8¼ inch casing and credit the company?

A. Some time during October.

Q. That is about as near as you can place it?

A. It is within five or ten days.

Q. Prior to October 26th? A. Yes, sir.

Mr. WHITAKER.—I offer that in evidence.

Q. I hand you a carbon copy purporting to be signed by the Cleveland Oil Company, by Edson France, treasurer, dated November 15, 1910, instructing the superintendent to deliver to Mr. J. L. Scott, your representative, the two pumps remaining on the property. Can you state whether the original was received by you about that time?

A. Yes, it was, because this is a copy of the original.

Mr. WHITAKER.—I offer that in evidence.

Q. And that is the letter stating when the pumps were returned, isn't it, Mr. Sands? A. It is.

Mr. WHITAKER.—We offer in evidence the letter written by Dr. France dated November 5th, 1910, on the paper of the [111] Cleveland Oil Company.

Q. I hand you a circular, purporting to be sent out by the New York Midway Oil Company of date December 20th, 1910, relating to the reorganization of the Cleveland Oil Company. I will ask you if you received that. A. I did.

Q. On or about that date?

A. Yes, it is dated December 20th—it may have been a day or two later.

(Testimony of John M. Sands.)

Q. It was on or about that time?

A. Yes, sir.

Q. Do you know where you received it from?

A. I can't— It came through the mail.

Q. Well, now, did you believe that that reorganization would be effected?      A. I believed so.

Q. Did you have any reason to think to the contrary up to the time the adjudication in bankruptcy was made, namely, on February 20th, 1911?

A. I had no reason to think that they were in a state of bankruptcy until that time.

Q. I hand you a letter of date November 5th, 1910, signed W. A. France, and ask you if you received that in the due course of the mail about that date.

A. I did. [112]

Mr. WHITAKER.—I think I would like to read this (reads): “November 5th, 1910, Mr. J. M. Sands, c/o R. H. Herron Company, Los Angeles, California. My Dear Mr. Sands,—A letter from your company received November 5th. In reply would say I presume that it would be more satisfactory to have a talk with my brother in regard to the affairs of myself and the Cleveland Oil Company. It was for that reason that I did not communicate direct with you. I am making arrangements to get back to Los Angeles as soon as possible. I feel quite sure if I were there that we could make everything satisfactory. If it is not too much trouble would like to have a copy of the letter referred to in regard to my guaranteeing payment of certain debts of the Cleveland Oil Company. We do not want any extra ex-

(Testimony of John M. Sands.)

pense made, expect to do everything possible to satisfy you in regard to the claims which you have either against me or the Cleveland Oil Company. The burning of our refinery and the bad luck in getting down our well in the Midway Field has set us back a little, but we are now making arrangements so that in a short time we expect to be able to satisfy all of our creditors. Would be glad to have you communicate with my brother as he can explain the matter better than I can write it. Would be glad to hear from you at any time. Yours truly, W. A. France."

Q. Did you believe that statement was true and correct?     A. I did.

Q. (By the REFEREE.) What date is that?

A. November 5th, 1910.

Q. And believed that the Cleveland Oil Company would [113] adjust its matters?

A. I did.

Mr. CRENSHAW.—I object to what the witness believes.

Mr. WHITAKER.—I think it goes to the gist of whether he believed that they are insolvent.

The REFEREE.—It is whether he had reasonable cause to believe.

Mr. CRENSHAW.—Yes, what a reasonable man would believe.

Mr. WHITAKER.—Well, of course I should have added that.

Q. Now, did you or did you not know, Mr. France, at that time the payment of fifty-two hundred dollars was made to you on the fifteenth day of Sep-



(Testimony of John M. Sands.)

tember, 1910, by the Cleveland Oil Company, that it was insolvent?     A. Why, I did.

Q. That calls for yes or no.

(Question read by reporter.)

A. I believed that they were solvent.

Q. You did not know, then, that they were insolvent, if insolvent?     A. I did not.

Q. Did you on or about the 26th day of October, the day you wrote that letter to your district manager in Taft in relation to the return of certain machinery, oil well casing which you had given them credit for at the rate of seventy-five per cent, on the purchase price, know that Cleveland Oil Company was insolvent, if insolvent?     A. I did not.

Q. Did you at the time the two pumps were returned, which was November 25th, I think, 1910, and which you had agreed to [114] receive and credit the Cleveland Oil Company with, to the estimate of three hundred dollars, know that the Cleveland Oil Company was insolvent, if insolvent?

A. I did not.

Q. When you, Mr. Sands, received the two thousand dollars in cash which was paid to you by the Cleveland Oil Company on the 15th day of September, 1910, have reason to believe that any preference was intended to be given the R. H. Herron Company by such payment?

Mr. CRENSHAW.—Object to the question.

The REFEREE.—That is the thing we are trying to find out.

Mr. WHITAKER.—I have a right to ask that

(Testimony of John M. Sands.)

question, I think. Just to ask him whether he had. Of course I am aware that you have to find on that.

The REFEREE.—Is it right for the witness to decide that question himself?

Mr. WHITAKER.—He could not decide it, but I think he can state whether he had cause to believe it. I can leave out the word “reasonable.” I think I have a right to my answer.

The REFEREE.—Answer the question subject to the objection.

A. I did not.

Q. Did you when the casing was returned?

A. I did not.

Q. Did you when the pumps were returned?

A. I did not.

The REFEREE.—I suppose you make the same objection.

Mr. CRENSHAW.—Yes, sir.

The REFEREE.—The same ruling. [115]

Q. Did you have any knowledge of the financial condition of the company, Mr. Sands, up to the time that this report was published or the articles in the newspaper which have been introduced?

A. Not until Mr. Mushet’s report was published.

Q. And that information, you got from this exhibit 3? A. Yes, sir.

Q. By the way, Mr. Sands; can you state whether or not the average credit given by your company to all of the oil companies is above or below fifteen hundred dollars?

A. Below fifteen hundred dollars.

(Testimony of John M. Sands.)

Q. Was the fact that you desired your local managers, and so instructed them, to curtail credit at certain periods, due to the fact that you considered the company bankrupt, or insolvent, or simply a business precaution according to your usual custom?

A. Just the usual custom and a business precaution.

Q. You, I believe, early in the commencement of the business with the Cleveland Oil Company, notified your manager at Bakersfield not to deliver over one hundred dollars' worth on their own responsibility on May 10th, 1909? A. I did.

Q. And were all large orders over that referred first to you? A. They were.

Q. Now, after you received this information October 6th, 1909, that the Cleveland Oil Company had been attached by the Associated Supply Company, for the sum of three thousand dollars, you still continued selling them goods? [116]

A. Yes, we sold them a great many goods after that date as evidenced by the records here.

Q. Now, after you had written that letter of July 22, 1910, I think that was the date, again instructing the local managers not to deliver goods over the sum of one hundred dollars, you sold them in the month of July, did you not, something over thirty-five hundred dollars? A. We did.

Q. And in the month of August nearly three thousand dollars? A. We did.

Mr. WHITAKER.—We offer these in evidence as one lot.

(Testimony of John M. Sands.)

The REFEREE.—It will be exhibit No. 4.

Mr. WHITAKER.—I think that is all.

The REFEREE.—Any redirect?

Redirect Examination.

(By Mr. CRENSHAW.)

Q. Mr. Sands, with reference to that account to which you were testifying, it shows all of the sales to the Cleveland Oil Company that you ever had with him? A. It does.

Q. There are none subsequent to the dates on that account? A. No, sir.

Q. Now, with reference to Mr. Mushet's report which you say you saw published. Do you remember what day you saw that?

A. I submitted this evidence. I notice that here. It was marked, I think, exhibit 2, to-day, and that was December 20th. [117]

Q. And you did not see any before that?

A. None. I think that was the first public record.

Q. But before that time, you knew that Mr. Mushet was making an examination of the books?

A. No, that was the first public record.

Q. Well, if it was published in the newspapers, before that, would you have seen it in the "Times"?

Mr. WHITAKER.—Object to his calling for the conclusion of the witness.

The REFEREE.—Objection sustained.

Mr. CRENSHAW.—I do not know about these newspapers. I think it is competent, for it shows a means of investigation; if he had investigated, he would have obtained information.

(Testimony of John M. Sands.)

The REFEREE.—He had a right to go to the books of the company, and anything that he could have gotten out of the books of the company he was chargeable with notice of.

Mr. CRENSHAW.—Unless the books—

The REFEREE.—I do not suppose that the newspapers could have found out any more than the books showed.

Mr. CRENSHAW.—I think that is all.

**[Testimony of W. J. Batchelder, for the Trustee.]**

W. J. BATCHELDER, a witness produced on behalf of the trustee, being first duly cautioned, and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. CRENSHAW.)

Q. You are a resident of Los Angeles? [118]

A. Yes, sir.

Q. How long have you lived in this city?

A. Four years.

Q. When were you first connected with the Cleveland Oil Company?

A. When it was incorporated.

Q. You were an officer of the company in the fall of 1910 during the months of August, September, October, November and December?

A. Yes, sir.

Q. What office did you hold? A. Secretary.

Q. Were you also treasurer? A. No, sir.

Q. There was a treasurer of the company?

A. Yes, sir.



(Testimony of W. J. Batchelder.)

Q. Are you familiar with its assets and liabilities?

A. More or less.

Q. Was there any particular change in the assets of the company between the 12th day of September and the date when it went into bankruptcy?

A. No, sir.

Q. Any important change in its liabilities?

A. No.

Q. Were you familiar with the R. H. Herron Company and the Cleveland Oil Company's account with them? A. More or less.

Q. Did you ever have any conversation with any of the employees of the R. H. Herron Company concerning that account? [119]

Mr. WHITAKER.—That is objected to, unless it is shown that the employee whom Mr. Batchelder talked with occupied a position of trust with the company, or were agents. He might have talked with a teamster.

Mr. CRENSHAW.—We will find out first whom he talked with; that is just preliminary.

The REFEREE.—Answer yes or no. A. Yes.

Q. Whom did you talk with?

A. Well, are you stating at a certain time?

Q. I mean during those fall months.

A. I will have to change that—no.

Q. Did you ever have any conversation with Mr. Sands?

Mr. WHITAKER.—You mean during those fall months?

Q. Commencing with the month of August?

(Testimony of W. J. Batchelder.)

A. I will have to change my answer back to yes.

Q. About when was that, if you remember?

A. In September or October.

Q. What was the nature of the conversation? Give the details of it to the best of your recollection.

A. I could not do that, because I did not have direct conversation with him. I recall his coming into the room, which was occupied by Edson France, the treasurer and myself, and consequently I could not help overhearing some of the conversation that took place.

Q. Can you give us that conversation, or the gist of it? A. I could not do it.

Q. You don't know what they were talking about?

A. It was in connection with money. [120]

Q. Was Mr. *France* demanding money from the company? A. Not to my knowledge.

Q. Do you know what he was doing up there?

A. We had an active account for oil well supplies, so it was in connection with that account.

Q. Do you know whether or not the account was very active in October?

A. I do not think it was very active in October.

Q. Is it not a fact that you were not buying anything in October from them, and didn't buy anything? A. No, not to my knowledge.

Q. Do you know whether you bought anything or not? A. I don't remember.

Q. Do you know whether or not your credit had been cut off? A. No, sir; I don't know that.

Q. Is that the only time that you ever heard any

(Testimony of W. J. Batchelder.)

conversation about this account?

A. With reference to those three months; that is all.

Q. Did you ever hear any conversation about the account before that time?

A. Yes, from the time that the company was incorporated.

Q. You handled it up to about what period?

A. I don't know what you mean by handling. I was secretary of the company. I was not handling it, not the accounts.

Q. Who had charge of the accounts, and most of the negotiations?      A. The treasurer.

Q. Who was the treasurer?

A. T. M. Montgomery, before Edson France came out. [121]

Q. Do you know what date, or about what date, he ceased to be treasurer and Edson France went in?

A. He resigned early in January, 1910, and Edson France then was elected to take his place as representative of Doctor France, the president, and was treasurer of the company.

Q. Then, the R. H. Herron Company never consulted with you about these accounts during the fall months?      A. They never did; no, sir.

Q. Did you ever pay them any money?

A. As secretary I signed my name to checks. The checks would be signed by the president, or treasurer, and countersigned by the secretary, and I was the secretary so I countersigned the checks and notes.

Mr. CRENSHAW.—I think that is all, if this witness did not have any conversation.

Mr. WHITAKER.—That is all.

Mr. CRENSHAW.—That is all of our case.  
[122]

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**[Statement of Account of Cleveland Oil Company  
With R. H. Herron Company, July, 1910, to January 12, 1911.]**

John Eaton,  
President of both Companies.

John M. Sands,  
Vice-president and Treasurer.  
R. H. Herron Co.

Prices subject to change without  
notice.

Richard E. Small,  
Secretary, R. H. Herron Co.  
Transportation Company's Receipt,  
Constitutes Delivery. Our Responsibility Then Ceases.

**R. H. HERRON CO.**  
Affiliated with  
**OIL WELL SUPPLY CO.**  
of Pittsburgh, Penn.

Branches:  
Bakersfield.  
Coalinga.  
Maricopa.  
San Francisco.  
McKittrick.  
Oreutt.  
Moron.  
Sisquoc.

Address all communications to Oil Well Supply Co.

All remittances should be made to Los Angeles.

Los Angeles, Cal., Jan. 12, 1911.

**Terms:**

Monthly settlements are required on  
all running accounts.

2% discount will be allowed for cash  
payment on or before the 20th of  
month, for purchases of preceding  
month, except on Freight, Expense  
Items, or Special Net Sales.

Interest will be computed at regular  
rates after the last day of the  
month following purchases.

**Phones:**

Sunset Main 8088

Home 10721

AT JUNCTION OF NORTH MAIN & ALAMEDA STS.

**SOLD TO—Cleveland Oil Company.**

**SHIPPED TO**

**FROM—**

**STATEMENT.**

**YOUR ORDER—**

**OUR ORDER.**

**[123]**

## EXHIBIT #1.

1910.

July.	Open Account.....	\$3547.23	
August.	“ “ .....	2920.76	
September.	“ “ .....	65.54	6533.53
Feb. 4/11.	Charge on Casing returned Oct. 31, 1910, account cartage .....		143.00

1910.

Dec. 1.	Credit for pumps returned.....	6676.53	300.00	6376.53
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## EXHIBIT #2.

1910.

Aug. 21.	Note due, dated May 23, 1910, with 6% interest from date.....			2868.15
Sept. 10.	Note due, dated May 9, 1910, with 7% interest from date.....			4052.79
Oct. 23.	Note due, dated June 23, 1910, with 7% interest from date.....			3198.31
Nov. 15.	Note due, dated July 16, 1910, with 7% interest from maturity.....			2607.43
				12726.68
Oct. 31.	Casing returned amount \$2823.37 to apply on note due Aug. 21, \$2868.15 less interest to maturity. 43.02	2780.35		
		\$2000.00		
Sept. 15	Payment made to ap- ply on note due Sept. 10, \$4052.79 less interest to maturity. 94.50	1905.50	4685.85	8040.83
				14417.36

## INTEREST.

Interest on July a/c \$3547.23	Sept. 1 to Jan. 1, '11. @ 7%	82.77	
“ “ Aug. a/c 2920.76	Oct. 1 to Jan. 1, '11. @ 7%	45.86	
“ “ Sept. a/c 65.54	Nov. 1 to Jan. 1, '11. @ 7%	.76	
“ “ Note due Aug. 21 \$2911.17	Aug. 21 to Oct. 31, '10 .....	@ 7%	39.05
“ “ Note balance \$87.80	Nov. 1 to Jan. 1, '11. @ 7%		1.02
“ “ “ \$2147.29	Sept. 10 to Jan. 1, '11. @ 7%		45.92
“ “ “ due Oct. 23 \$3198.31	June 23 to Oct. 23, '10 .....	@ 7%	74.62
“ “ Note due Oct. 23 \$3272.93	Oct. 23 to Jan. 1, '11 .....	@ 7%	43.30
“ “ Note due Nov. 15 \$2607.43	Nov. 15 to Jan. 1, '11 .....	@ 7%	22.83
“ “ Principal \$14417.36	from Jan. 1 to Jan. 12, '11 .....	@ 7%	30.83
			386.96



[Letter Dated May 10, 1909, from R. H. Herron Company to Oil Well Supply Company, Bakersfield.]

Los Angeles, Cal., May 10, 1909.

Oil Well Supply Co.,

Bakersfield, Cal.

CLEVELAND OIL CO.

Gentlemen:—

Do not deliver any large amount of supplies to the Cleveland Oil Co., without first getting authority from this office. You may deliver to them the little things they need to an amount not over \$100.00, if they require it, but all purchases in excess of the \$100.00 specified must be referred to this office.

Yours very truly,

R. H. HERRON CO.,

Affiliated with the OIL WELL SUPPLY CO. of  
Pittsburgh, Penn.

WALTER H. LYON,

Secretary.

WHL/McD. [125]

**[Letter Dated May 11, 1909, from R. H. Herron Company to Oil Well Supply Company, Los Angeles.]**

John Eaton,  
President of both Companies.

John M. Sands,  
Vice-president & Treasurer.  
R. H. Herron Co.

Walter H. Lyon,  
Secretary R. H. Herron Co.

Main Office:  
Los Angeles, Cal.

Branches:  
San Francisco, Cal.  
Coalinga, "  
Bakersfield, "  
Orcutt, "  
Maricopa, "  
McKittrick, "  
King City, "

Machine and Forge Works:  
Los Angeles and Coalinga.

**R. H. HERRON CO.**

Affiliated with

**OIL WELL SUPPLY CO.**

of

Pittsburg, Pa.

Bakersfield, Calif., May 11, 1909.

Oil Well Supply Co.,

Los Angeles, Calif.

Gentlemen:—

We are in reply to your letter asking us not to deliver any more supplies to the Cleveland Oil Co. About an hour or two previous to our receiving this letter we had delivered to them 1000 ft. 3" Tubing and have on file at the present time an order for 1000 ft. more 3" Tubing also 1000 ft.  $\frac{7}{8}$ " Imperial Rods.

We judge from the tone of your letter that you do not wish us to deliver these goods. We now have a call in for Mr. Sands and will possibly get him before your office closes this evening, if so we will explain this matter to him and will no doubt be advised as

to the course we shall pursue.

Yours truly,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO. of  
Pittsburg, Penn.

J. L. SCOTT.

RECEIVED

R. E. Small

May 1 —————

Ans'd ————— Ref. to —————

A.M. 7/8/9/10/11/12 —————

[126]

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[Letter Dated June 26, 1909, from R. H. Herron  
Company to J. L. Scott, Manager Oil Well Sup-  
ply Company, Bakersfield.]

Los Angeles, Cal., June 26, 1909.

CLEVELAND OIL CO.

Mr. J. L. Scott, Mgr.,

OIL WELL SUPPLY CO.,

Bakersfield, Cal.

Dear Sir:—

We are in receipt of your favor of the 25th. Have had a call in at the company's office for Mr. Montgomery, who represents Dr. France. I want to let him know that we understand the conditions at Bakersfield, and that would have a tendency to relieve the anxiety of the teamsters, for doubtless he will get busy and send in some cash. Mr. Gillette is in the East or we would take the matter up with him.

There are many instances where we can be of value

to a company as well as ourselves by passing on such information. Most companies appreciate a favor of this kind, and of course we always try to discern this before presenting the information.

For your own guidance, don't deliver them any goods to large extent until you are instructed from this office or until you have received notice that they have made a further cash payment.

Yours truly,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO. of  
Pittsburg, Penn.

JOHN M. SANDS,  
Treasurer.

JMS/EVM. [127]

**[Letter Dated October 16, 1909, from Oil Well Supply Company to John M. Sands, Manager Oil Well Supply Company, Los Angeles.]**

John Eaton,  
President of both Companies.

John M. Sands,  
Vice-president & Treasurer.  
R. H. Herron Co.

Walter H. Lyon,  
Secretary R. H. Herron Co.

Main Office:  
Los Angeles, Cal.

Branches:  
San Francisco, Cal.  
Coalinga, "  
Bakersfield, "  
Oreutt, "  
Maricopa, "  
McKittrick, "  
King City, "  
Midway, "

Machine and Forge Works:  
Los Angeles and Coalinga.

**R. H. HERRON CO.**

Affiliated with  
**OIL WELL SUPPLY CO.**  
of

Pittsburg, Pa.  
Bakersfield, Calif., Oct. 16, 1909.

[In pencil:]

Jno. M. Sands, Mgr., 1260. "  
Oil Well Supply Co., Cleveland Oil Co.  
Los Angeles, Calif.

Dear Sir:—

We learned to-day that the Associated Supply Co., have attached the Cleveland Oil Co. The Cleveland Oil Co. owe the Associated Supply Co. approximately \$3,000.00. We got this information from their former superintendent, Mr. James Jones.

We give you this for your information, and oblige.

Yours truly,  
**OIL WELL SUPPLY CO.,**  
Per W. C. HILL. [128]



[Letter Dated December 23, 1909, from W. A. France  
to John M. Sands.]

THE FRANCE MEDICAL INSTITUTE CO.

Chronic Diseases a Specialty.

Nos. 38 & 40 West Gay Street.

Established

1886

Telephone

2862

Columbus, O. 12/23/1909.

[In pencil:]

1260.

Cleveland Oil Co.

Jno. M. Sands, Vice-pres.,

R. H. Herron Company,

Los Angeles, Calif.

My dear Mr. Sands:—

I thought I would write you a few lines to let you know that I am still alive and doing business as usual. I arrived home November 1st. Since coming home, I have kept in touch with our oil properties in California almost as well as if I was at our office in Los Angeles; receiving a letter nearly every day from our Superintendent in the field, as well as from our office in Los Angeles. Things have been going along very nicely with us. We have now eight producing wells, and as near as I can get at the facts, we are getting from 8,000 to 10,000 barrels of oil per month. We have been selling our oil as fast as we could produce it, and have sold some as high as 75 cents per barrel. We have just closed up a contract with some Boston people, who I under-

stand are very strong people financially, for the lease of our Refinery for two years; also have contracted [129]

THE FRANCE MEDICAL INSTITUTE CO.

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1886

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2862

Columbus, O. 12/23/1909.

Mr. Sands—2.

with them for 240,000 barrels of oil at the rate of 65 cents per barrel, which we are to furnish them at the rate of 10,000 barrels per month. This is to use in the Refinery for making asphalt. Our Refinery has a capacity of 500 tons of asphalt per month.

We are now putting down two more wells; one on the Kern River field, and the other well, which you know of, in Midway. Everything seems to look very promising for our well in Midway. As you undoubtedly know, they have made some good strikes there within the past few weeks. I will enclose you a statement of the Cleveland Oil Co's. property, so that you can have some idea of our holdings.

The \$5,055.00 note which becomes due, I think January 1st, will be paid. I see that there is another note of \$3,691.88 of the France Oil Co., or W. A. France, on which I would like to have a little extension of time. I expect to be in Los Angeles sometime during next month. Money that has been raised for the [130]

## THE FRANCE MEDICAL INSTITUTE CO.

Chronic Diseases a Specialty.

Nos. 38 &amp; 40 West Gay Street.

Established

1886

Telephone

2862

Columbus, O. 12/23/1909.

Mr. Sands—3.

development of our property has nearly all been raised by myself. The \$5,055.00 which we promised you to pay without fail when due, I have sent to California, so that you will be sure of that note being paid.

Everything is going along very nicely with me; although it requires considerable money to get things started. As I presume you know, I am interested in the Bankers Oil Co., and own a fifth of it. We are starting to develop that property, and as I understand it, have started to drill four wells. All these things have kept me hustling around to get my matters in shape to get ready money. You need have no fears in regard to any claims you have against me or the Cleveland Oil Co.'s property, as we will get there if you will have a little patience with us.

I would be pleased to hear from you.

Yours truly,

W. A. FRANCE.

WAF/HM.

[In pencil:] 3691.88. Feb. 1st. [131]

[Letter Dated December 28, 1909, from R. H. Herron  
Company to Dr. W. A. France.]

[In pencil:] 1260.

Los Angeles, California, December 28th, 1909.

Dr. W. A. France,  
38-40 West Gay Street,  
Columbus, Ohio.

Dear Mr. France:

Am pleased to receive your letter of the 23d inst. and am most interested in the report enclosed. It is very evident that you have valuable properties. Just at this particular time interest is being taken in the section near the California Midway and understand it will soon be in.

The contract that you have for sale of the oil with the Cleveland Oil Co. is a very good one. Mr. Montgomery was in the other day and wanted to renew \$2,000.00 of the Cleveland Oil Co. note due December 31st for \$5,055.00 and granted him the privilege of a sixty-day renewal for the \$2,000.00. At that time I was counting on the payment of the France Oil Co. note for \$3,691.88, which would be due on February 1st, but since the receipt of your letter, I conclude it is more agreeable to you to make payment in full of the Cleveland Oil Co. note, in which event we will grant you a sixty-day renewal of the France Oil Co. note which is to bear your personal endorsement. As the note of the France Oil Co. is not due until February 1st and as you have arranged to be in Los Angeles before that date, we will not send the

note to you for your personal endorsement as you will be on the ground to conclude the matter.

With kindest regards, we remain,

Yours very truly,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO., of  
Pittsburgh, Penn.

JOHN M. SANDS,

Treasurer.

JMS/R. [132]

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[Letter Dated January 11, 1910, from R. H. Herron  
Company to Oil Well Supply Company, Taft.]

[In pencil:] 1260.

Los Angeles, California, January 11th, 1910.

Oil Well Supply Co.,

Taft, California.

Cleveland Oil Company.

Gentlemen:—

You are privileged to deliver the above company supplies to the amount of \$1500.00. For anything in excess of this amount, communicate with this office. They are owing us considerable money and they have not acquired the habit of discounting their bills, which is our reason for the limited credit.

Yours very truly,

R. H. HERRON CO.

Affiliated With the OIL WELL SUPPLY CO., of  
Pittsburgh, Penn.

JOHN M. SANDS,

Treasurer.

JMS/R. [133]



[Letter Dated January 17, 1910, from W. A. France  
to John M. Sands.]

THE FRANCE MEDICAL INSTITUTE CO.

Chronic Diseases a Specialty.

Nos. 38 & 40 West Gay Street.

Established

1886

Telephone

2862

Columbus, O., January 17, 1910.

Jno. M. Sands, Sec'y.

R. H. Herron Co.,

Los Angeles, Calif.

Dear Sir:—

Yours of the 11th received. I was very glad to hear from you, and to know that everything would be satisfactory in regard to the extension of time on the France note, if the balance of the Cleveland Oil Co. note, namely: \$2,055.42, was paid when due. I am not sure whether that note is due Feb. 1st, or March 1st, but I presume Mr. Montgomery will inform me.

I expect to be in Los Angeles sometime next month, and will be very glad to meet you and tell you all about our properties. I am investing a great deal of money at this time, and it keeps me on the move to keep things going.

Will be glad to hear from you at any time.

Yours truly,

W. A. FRANCE.

WAF/HM.

[In pencil:] Note Cleveland Oil Co. Due 2/28, 2055.42. Note France Oil Co. Due 2/1, 3691.88.

[134]

[Letter Dated January 12, 1910, from R. H. Herron Company to Oil Well Supply Company, Bakersfield, Moron, Maricopa.]

Los Angeles, Calif., Jan. 21, 1910.

Oil Well Supply Company,

Bakersfield, Moron, Cleveland Oil Company.  
Maricopa.

Gentlemen:—

The amount of their open account is \$4,819.58.

In addition to this they owe us a note due on the 28th day of February for \$2,055.42, and another due on the 15th of February for \$6,617.66. We feel this is quite enough that is providing the information, which was given us by Mr. Scott when at Bakersfield the other day, is correct to the effect that they were owing considerable sums for lumber bills, and there were other creditors around for other small bills who were unable to get their money.

We would be glad to have a report from each representative to whom this is directed telling us as soon as possible regarding their holding in your respective district.

In the meantime we are going to permit you to make further deliveries of \$1,000.00. This does not mean for each special store, but \$1,000.00 for the three stores. So please keep in touch so as to see that the instructions are not in any way violated.

Yours truly,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO. of  
Pittsburg, Penn.

JOHN M. SANDS,

JMS/HR. [135]

Treasurer.

THE FRANCE MEDICAL INSTITUTE CO.

Chronic Diseases a Specialty.

Nos. 38 & 40 West Gay Street.

Established

1886

Telephone

2862

Columbus, O., Feb. 9, 1910.

Mr. Jno. M. Sands,

c/o R. H. Herron Co.,

Los Angeles, Calif.

My dear Mr. Sands:—

We are arranging to put down three or four more wells on our Cleveland Oil Co. property in the Kern River field.

I have written Mr. Montgomery that if he could make the proper arrangements with you, and if you would do as well by us as any other firm, that it would greatly please me for us to do all the business with you that we possibly could; that I felt you knew something about my responsibility, and that I would sooner have our business confined to a few people rather than to divide it up among a half-dozen.

Would like to have you see Mr. Montgomery, and give him figures on the supplies which we will have to use within a short time.

We feel that we are getting things arranged here in the East so that we will get along and perhaps be able to pay our bills a little more promptly, but even if they are not fully paid up within 30 or 60 days, we feel that we can satisfy you that you are taking no chance in accommodating us as you have in the past.

Expect to be out there during this month. Will notify you as soon as I get to Los Angeles, as I am very anxious to see you and talk over our business affairs.

Yours truly,

W. A. FRANCE. [136]

[Letter Dated August 5, 1910, from Oil Well Supply Company to John M. Sands.]

[In pencil:] 1260.

John Eaton,  
President of both Companies.

John M. Sands,  
Vice-president & Treasurer.  
R. H. Herron Co.

Walter H. Lyon,  
Secretary R. H. Herron Co.

Main Office:  
Los Angeles, Cal.

Branches:  
San Francisco, Cal.  
Coalinga, "  
Bakersfield, "  
Orcutt, "  
Maricopa, "  
McKittrick, "  
King City, "  
Midway, "

Machine and Forge Works:  
Los Angeles and Coalinga.

**R. H. HERRON CO.**

Affiliated with

**OIL WELL SUPPLY CO.**

of

Pittsburg, Pa.

Bakersfield, Cal., August 5, 1910.

Cleveland Oil Co.,

Mr. John M. Sands, Manager,

Oil Well Supply Company,

Los Angeles, Cal.

Dear Sir:—

We are delivering goods to the Cleveland Oil Company in small quantities almost daily since our telephone conversation of a few days ago when you advised that you expected a settlement from them.

The amounts are not large but they have exceeded

the \$100.00 limit you placed in your letter of the 22d ult. This you will remember was done on your authority but we would like to be advised if we shall communicate with you should they want goods for any large amount now, say \$200.00 or over or shall we deliver same as before receiving your letter of the 22nd ult.

Yours very truly,  
OIL WELL SUPPLY COMPANY,  
Per GEO. W. CHURCH. [137]

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[Letter Dated August 6, 1910, from Cleveland Oil Company to Oil Well Supply Company, Los Angeles.]

[In pencil:] 1260.

W. A. France, Pres. T. M. Montgomery, Treas.

Wm. J. Batchelder, Secy.

CLEVELAND OIL COMPANY,

426-427 H. W. Hellman Building.

Phones:

Home A8726

Sunset Bway 1732

Los Angeles, Cal., Aug. 6, 1910.

Oil Well Supply Co.,

Los Angeles, Cal.

Gentlemen:—

Enclosed we hand you check for \$1500 which please credit to our account, acknowledge receipt, and oblige.

Yours very truly,

CLEVELAND OIL CO.

By W. J. BATCHELDER,

Secy. [138]



[Letter Dated August 6, 1910, from R. H. Herron  
Company to Oil Well Supply Company, Taft.]

[In pencil:] 1260.

Los Angeles, California,

August 6th, 1910.

Oil Well Supply Co.,

Taft, California.

Gentlemen:—

Cleveland Oil Company.

Confirming our telephone conversation of yesterday, you have the privilege of delivering the Cleveland Oil Company 1100' of 8 $\frac{1}{4}$ " 28# Casing. This is granted for the reason they are to pay us its equivalent in cash, today.

Yours very truly,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO. of  
Pittsburgh, Penn.

JOHN M. SANDS,

Treasurer.

JMS/R. [139]

**[Letter Dated August 10, 1910, from R. H. Herron  
Company to Cleveland Oil Company.]**

Los Angeles, Cal., Aug. 10, 1910.

Cleveland Oil Co.,

426 H. W. Hellman Bldg., City.

Gentlemen:—

We are handing you herewith canceled note dated  
June 23, 1910, for \$3,000.00; also receipt for \$1526.83.

Yours truly,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO. of  
Pittsburgh, Penn.

JOW-McD.

Encs. [140]

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**[Letter Dated August 13, 1910, from R. H. Herron  
Company to John M. Sands.]**

[In pencil:] 1260.

Los Angeles, Cal., Aug. 13, 1910.

Mr. John M. Sands, CLEVELAND OIL CO.,  
San Francisco, Cal. WHL-8/13/10.

Dear Sir:—

A day or two after you left here the Moron store called us by 'phone and wanted to know if they should deliver to the Cleveland Oil Co. a full car of 8¼" 36# casing in place of the 1100' 8¼" 36# which you authorized. I told them if it was necessary they could deliver up to 1200' as they required that amount on their well, but not to deliver a full car load.

Bakersfield called up and said they wanted 500' 10" 40# casing. In instructed them not to deliver it. I called Judge Campbell on the 'phone and advised him that his superintendent wished the pipe and he stated he would investigate and advise us. So far we have heard nothing from him. The Judge did not seem to be at all hurt over the transaction but rather seemed to appreciate the fact that it gave them an opportunity to keep track of their purchases and make arrangements from the main office.

The Cleveland Oil Co., as you will doubtless remember paid the balance of the \$3000.00 note last Monday, but have paid us nothing on the open account.

Very truly yours,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO. of  
Pittsburgh, Penn.

WALTER H. LYON,  
Secretary.

WHL/McD. [141]

[Letter Dated August 22, 1910, from Walter H. Lyon  
to J. M. Sands.]

[In pencil:] 1260

John Eaton,  
President of both Companies.

John M. Sands,  
Vice-president & Treasurer.  
R. H. Herron Co.

Walter H. Lyon,  
Secretary R. H. Herron Co.

Main Office:  
Los Angeles, Cal.

Branches:  
San Francisco, Cal.  
Coalinga, "  
Bakersfield, "  
Orcutt, "  
Santa Maria, "  
Maricopa, "  
Moron, "  
McKittrick, "

Machine and Forge Works:  
Los Angeles and Coalinga.

R. H. HERRON CO.

Affiliated with

OIL WELL SUPPLY CO.

of

Pittsburgh, Pa.

Address all Communications to "Oil Well Supply  
Co."

Los Angeles, Cal., Aug. 22, 1910.

Mr. John M. Sands,

San Francisco, Calif.

Dear Sir:—

CLEVELAND OIL CO.  
"In Reply Please Refer to"  
WHL-8/22-10

Had a talk with Mr. Batchelder of the Cleveland Oil Co. this morning. It seems that their refinery in the Kern River Fields burned down Saturday, and that they are having trouble in raising the \$1700.00 necessary for the 1000' 8" casing for the Kern River Field.

It seems that the National sent them a car of 8¼" to the Midway field, and by mistake their Supt. un-

loaded it and hauled it out. You know we gave them 1000' there and the result is, that they have 2000' *feet* too much in the Midway field and have none in the Kern River.

They have not taken care of their note due today.

We are simply giving you this information that you may be in touch with the matter.

Very truly yours,

\_\_\_\_\_,  
\_\_\_\_\_,  
\_\_\_\_\_

WALTER H. LYON,  
Secretary.

WHL—McD.

[In pencil:]

Keep after them at least twice a day.

Make them come through.—J. M. S. [142]



**[Letter Dated October 26, 1910, from R. H. Herron  
Company to J. L. Scott.]**

Los Angeles, California, October 26th, 1910.

Mr. J. L. Scott, District Manager,

R. H. Herron Co., Affiliated with Oil Well Supply Co. Pittsburgh, Pa., Taft, Calif.

Dear Sir:—

We haven't received any record of the Casing that we arranged to have returned by the Cleveland Oil Company, to the Taft store. Please advise promptly.

Yours very truly,

R. H. HERRON CO.,

Affiliated with the OIL WELL SUPPLY CO. of  
Pittsburgh, Penn.

JOHN M. SANDS,

Treasurer.

JMS/R. [143]

[Letter Dated November 5, 1910, from W. A. France  
to J. M. Sands.]

[In pencil:] 1260

THE FRANCE MEDICAL INSTITUTE CO.

Chronic Diseases a Specialty.

Nos. 38 & 40 West Gay Street.

Established

1886

Telephone

2862

Columbus, O. Nov. 5, 1910.

Mr. J. M. Sands,

c/o R. H. Herron Co.,  
Los Angeles, Cal.

[In pencil:]  
Cleveland Oil Co.

My dear Mr. Sands:—

A letter from your company received November 5th. In reply, would say I presume that it would be more satisfactory to have a talk with my brother in regard to the affairs of myself and The Cleveland Oil Co. It was for that reason that I did not communicate direct with you. I am making arrangements to get back to Los Angeles as soon as possible. I feel quite sure if I were there that we could make everything satisfactory.

If it is not too much trouble, would like to have a copy of the letter referred to, in regard to my guaranteeing payment of certain debts of the Cleveland Oil Co. We do not want any extra expense made, and expect to do everything possible to satisfy you in regard to the claims which you have, either against me or the Cleveland Oil Co. The burning of our

refinery and the bad luck in getting down our well in the Midway field has set us back a little, but we are now making arrangements so that in a short time we expect to be able to satisfy all of our creditors. Would be glad to have you communicate with my brother, as he can explain the matter better than I can write it. Will be glad to hear from you at any time.

Yours truly,

W. A. FRANCE.

(Endorsed:) U. S. District Court No. 686. Claimant—Exhibit No. 4. Filed July 25, 1912. Helm, Referee. [144]

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[Letter Dated November 15, 1910, from Cleveland Oil Company to Mr. Ware.]

[In pencil:] 1260.

Los Angeles, California, November 15th, 1910.  
Mr. Ware, Supt.,  
Cleveland Oil Co., Midway, California.

Dear Sir:—

This will instruct you to deliver to Mr. J. L. Scott, representative of the R. H. Herron Company, or bearer, the two Pumps that are on our property.

Yours very truly,

CLEVELAND OIL COMPANY.

[In pencil:] Signed (Edson France) Treas.

[145]

[Letter Dated November 25, 1910, from J. L. Scott  
to John M. Sands.]

John Eaton,  
President of both Companies.

John M. Sands,  
Vice-president & Treasurer.  
R. H. Herron Co.

Main Office:  
Los Angeles, Cal.

Branches:  
San Francisco, Cal.  
Coalinga, "  
Bakersfield, "  
Oreutt, "  
Maricopa, "  
McKittrick, "  
King City, "  
Midway "

Machine and Forge Works:  
Los Angeles and Coalinga.

**R. H. HERRON CO.**

Affiliated with

**OIL WELL SUPPLY CO.**

of

Pittsburgh, Pa.

Taft, Calif., Nov. 25th, 1910.

John M. Sands General Manager,

R. H. Herron Company.

Los Angeles, Calif.

Dear Sir:—

The Cleveland Oil Co. returned the Pumps of which you wrote this morning. One of them is pretty badly stripped of parts, and we are told that the Consolidated Midway Co. or someone else will give us an order for the parts needed as soon as we can inspect the pumps and find out just what is wanted. This we will do at once, and will put them in shape to dispose of. Are we to give the Cleveland Oil Co. credit for the pumps, and place them in our stock, or will you attend to that.

Yours truly,

J. L. SCOTT. [146]

[Letter Dated December 20, 1910, from New York-Midway Oil Company to the Stockholders of the Cleveland Oil Company.]

[In pencil:] 1260.

G. E. Averill, President.  
M. P. Waite, Vice-president.

C. C. Spicer, Treasurer.  
M. Kinney, Secretary.

File with Cleveland Oil Co.

NEW YORK MIDWAY OIL COMPANY.

Phones Main 4931.

F-5495.

603 W. P. Story Building.

Los Angeles, Cal.

Los Angeles, Cal., Dec. 20, 1910.

To the Stockholders of the Cleveland Oil Co.

Gentlemen:

The New York-Midway Oil Company was recently incorporated with a capital of \$1,250,000 under the laws of the State of California by several of the larger stockholders of the Cleveland Oil Company. The object of this company is to acquire the property of the Cleveland Oil Company upon some basis fair to the bondholders, the creditors and the stockholders of the Cleveland Oil Company. All of the stock of this company is in its treasury. We have concluded arrangements with practically all of the bondholders by which this company will acquire all of the bonds of the Cleveland Oil Company, amounting to \$100,000, for about 300,000 shares of stock.

The Cleveland Company owes, in addition to its bond issue, about \$50,000 to general creditors. There are now pending, three suits against the Cleveland Company, involving the payment of various sums of



money and also involving the title to some of the company's leases. It is the intention of the New York-Midway Oil Company to settle with all these creditors, to adjust all matters now in litigation and to save to the individuals who are the stockholders of the Cleveland Oil Company the equity which they now have in their property.

In order to accomplish these purposes the New York-Midway Oil Company hereby offers for a period of thirty days to each stockholder of the Cleveland Oil Company the privilege of [147] exchanging his stock, for stock in the New York-Midway Oil Company upon a basis of ten shares of Cleveland for one share of New York-Midway, and of purchasing an additional amount of stock in the New York-Midway Oil Company equal to his original holding of Cleveland, upon the payment of ten cents per share; this payment to be made in four equal monthly installments. After this plan has worked out the New York-Midway Oil Company will own all the bonds of the Cleveland property, it will have settled all of the debts of the Cleveland Company, and will own all of the stock of the Cleveland Company.

Very truly yours,

NEW YORK-MIDWAY OIL COMPANY.

By M. KINNEY, Secretary. [148]

**[Order of Court Confirming Report of Referee.]**

At a stated term, to wit, the January Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the Court-room thereof, in the city of Los Angeles, on Monday, the 20th day of January, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 686—BKCY. S. D.

In re CLEVELAND OIL COMPANY, Bankrupt.

This matter coming on at this time to be heard on a review of the order of the Referee in bankruptcy herein disallowing the claim of R. H. Herron & Company for \$14,804.32, unless said claimant should surrender and pay to the trustee in bankruptcy herein the sum of \$5,123.37, paid to it as a preference, together with interest as specified in said order; Geo. E. Whitaker, Esq., appearing as counsel for R. H. Herron & Company, Lorin E. Crenshaw, Esq., appearing as counsel for the trustee in bankruptcy; and said matter having been argued, on behalf of R. H. Herron & Company by Geo. E. Whitaker, Esq., of counsel for said creditor, and on behalf of the trustee by Lorin E. Crenshaw, Esq., of counsel for said trustee, and on behalf of R. H. Herron & Company by Geo. E. Whitaker, Esq., of counsel for said creditor, and the report of the Referee herein having thereupon been submitted to the Court for its

consideration and decision; it is now by the Court ordered that the report of the Referee in bankruptcy concerning this matter be, and the same hereby is confirmed, to which ruling of the Court, on motion of Geo. E. Whitaker, Esq., of counsel for R. H. Herron & Company, exceptions are, by direction of the Court, hereby noted herein on behalf of said R. H. Herron & Company. [149]

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**[Petition for Appeal and Order Allowing Appeal.]**

*In the District Court of the United States, for the Southern District of California, Southern Division.*

No. 686—IN BANKRUPTCY.

In the Matter of the CLEVELAND OIL COMPANY, Bankrupt.

PETITION ON APPEAL OF THE R. H. HERRON COMPANY, A CORPORATION, A CREDITOR OF THE CLEVELAND OIL COMPANY, A CORPORATION, BANKRUPT.

The above-named R. H. Herron Company, a creditor of the Cleveland Oil Company, a corporation, bankrupt, considering it is aggrieved by the judgment and order made and entered on the 20th day of January, 1913, in the above-entitled cause, does hereby appeal from such judgment and order to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and the said R. H. Herron Company prays that this appeal may be allowed, and that a transcript of the records,

proceedings and papers upon which said judgment and order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

GEO. E. WHITAKER,

Attorney for the R. H. Herron Company, a Corporation, Creditor of the Cleveland Oil Company, a Corporation, Bankrupt.

The foregoing claim of appeal is allowed.

Dated January 30th, 1913.

OLIN WELLBORN,

District Judge.

[Endorsed:] No. 686. In the District Court of the United States for the Southern District of California, Southern Division. [150] In the Matter of the Cleveland Oil Company, Bankrupt. Petition for Appeal and Order Allowing Appeal. Filed Jan. 30, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Jan. 30, 1913. Rec'd Copy, Hickcox & Crenshaw, Attys. for Trustee. Geo. E. Whitaker, Stoner Block, Bakersfield, Cal., Attorney for R. H. Herron Co. [151]

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**[Assignment of Errors on Appeal.]**

*In the District Court of the United States, for the Southern District of California, Southern Division.*

No. 686—IN BANKRUPTCY.

In the Matter of the CLEVELAND OIL COMPANY,

Bankrupt.

And now on this the 30th day of January, 1913, came the R. H. Herron Company, a creditor of the Cleveland Oil Company, a corporation, bankrupt, by Geo. E. Whitaker, Esq., its attorney, and says that the judgment and order rendered and made in said cause confirming the findings and decree of Lynn Helm, Esq., Referee in bankruptcy for the county of Los Angeles, and adjudging that the said R. H. Herron Company had received preferences from said bankrupt while a creditor thereof, and had reasonable cause to believe that the said Cleveland Oil Company, a corporation, was insolvent at the time of the payments and transfers made by said Cleveland Oil Company to said R. H. Herron Company and objected to by said trustee, is erroneous and against the just right of the said R. H. Herron Company, and it assigns the judgment and order of said District Court so rendered and made as erroneous and against its just right in that it was adjudged that:

FIRST.—That the evidence adduced before said Referee at the hearing of the objections made to the allowance of the claim presented and filed by the said R. H. Herron Company, against the estate of said Cleveland Oil Company, a corporation, bankrupt, showed that a preference was received by the said R. H. Herron Company.

SECOND.—That said Court erred in finding that the said R. H. Herron Company had reasonable cause to believe that it was intended thereby to give a preference to it by the payment [152] of the moneys and the transfers of material in the amounts and at the times set forth and objected to by said



trustee; and in affirming the findings and decree of said Referee in that respect. •

THIRD.—That said Court erred in finding from the evidence that the said R. H. Herron Company received any preference by reason of any payments of money or transfers of material, and in affirming the findings and decree of the Referee in that respect.

FOURTH.—That said Court erred in finding that any payments or transfers made to the said R. H. Herron Company by said bankrupt were preferences for any amount, and in affirming the findings and decree of said referee in that respect.

FIFTH.—That said Court erred in ordering said R. H. Herron Company to pay the sum of \$5,123.37, or any sum at all, to the trustee before its said claim for \$14,804.32 as filed be allowed, and in affirming the findings and decree of said Referee in that respect.

SIXTH.—That said Court erred in its conclusions of law and in affirming the conclusions of law found by the Referee from the evidence given at the hearing had before him in said matter.

WHEREFORE, the said R. H. Herron Company prays that the said judgment and order may be reversed and that it be ordered, adjudged and decreed by this Honorable Court that the said R. H. Herron Company received no preferences whatever from said bankrupt, and that the claim filed by it against the estate of said bankrupt be ordered allowed in full.

GEO. E. WHITAKER,

Attorney for said R. H. Herron Company.

[Endorsed:] No. 686. In the District Court of the United States [153] for the Southern District

of California, Southern Division. In the Matter of the Cleveland Oil Company, Bankrupt. Assignment of Errors on Appeal. Filed Jan. 30, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Jan. 30, 1913. Rec'd copy, Hickcox & Crenshaw, Attys. for Trustee. Geo. E. Whitaker, Stoner Block, Bakersfield, Cal., Attorney for R. H. Herron Co. [154]

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[Bond on Appeal.]

*In the District Court of the United States, for the Southern District of California, Southern Division.*

No. 686—IN BANKRUPTCY.

In the Matter of the CLEVELAND OIL COMPANY,

Bankrupt.

KNOW ALL MEN BY THESE PRESENTS: That we, R. H. Herron Company, a corporation, as principal, and R. J. White and Martin Gundlach, as sureties, are held and firmly bound unto Wm. H. Moore, Jr., trustee in bankruptcy of the Cleveland Oil Company, a corporation, bankrupt, in the full and just sum of Five Hundred Dollars (\$500.00), to be paid to the said Wm. H. Moore, Jr., trustee as aforesaid, his certain attorneys or successors in interest; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of

January, in the year of our Lord one thousand nine hundred and thirteen.

WHEREAS, lately at the District Court of the United States, for the Southern District of California, Southern Division, in the hearing of the petition by the R. H. Herron Company, a corporation, for a review of the findings and decree of Lynn Helm, Esq., referee in bankruptcy for the county of Los Angeles, in the matter of a claim filed by the said R. H. Herron Company, a corporation, against the estate of the Cleveland Oil Company, a corporation, bankrupt, wherein the said referee in bankruptcy had disallowed said claim upon the ground of the said R. H. Herron Company having received a [155] preference while a creditor of said Cleveland Oil Company, bankrupt, a judgment and order was rendered and made by said court in favor of Wm. H. Moore, Jr., trustee of said bankrupt, and against the said R. H. Herron Company, and affirming the findings and decree of said referee in bankruptcy in said matter, and the said R. H. Herron Company having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the judgment and order in the aforesaid matter, and a citation directed to the said Wm. H. Moore, Jr., trustee of said Cleveland Oil Company, a corporation, bankrupt, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden at the city of San Francisco in said Circuit, on the 28th day of February next.

Now, the condition of the above obligation is such

that if the said R. H. Herron Company shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its appeal good, then the above obligation to be void; else to remain in full force and effect.

R. H. HERRON COMPANY (Principal).

By GEO. E. WHITAKER,

Its Attorney in Fact.

R. J. WHITE (Surety).

MARTIN GUNDLACH (Surety). [156]

State of California,  
County of Kern,—ss.

R. J. White and Martin Gundlach, the sureties whose names are subscribed to the above undertaking, being duly sworn, depose and say: That they are each residents and householders within the State of California, and are each worth the sum specified in the said undertaking as the penalty thereof, over and above all their just debts and liabilities, exclusive of property exempt from execution.

R. J. WHITE.

MARTIN GUNDLACH.

Subscribed and sworn to before me this 29 day of January, 1913.

[Seal]

J. A. HERPEL,

Notary Public in and for the County of Kern, State of California.

Approved by:

OLIN WELLBORN,

United States District Judge, this 30th day of January, 1913.

[Endorsed]: No. 686. In the District Court of the United States for the Southern District of California, Southern Division. In the Matter of the Cleveland Oil Company, Bankrupt. Bond on Appeal. Filed Jan. 30, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Jan. 30, 1913. Rec'd copy, Hickcox & Crenshaw, Attys. for Trustee. Geo. E. Whitaker, Stoner Block, Bakersfield, Cal., Attorney for R. H. Herron Co.  
[157]

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[**Praeipie for Transcript.**]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California.*

Clerk's Office.

No. 686—BKCY.

In the Matter of the CLEVELAND OIL COMPANY, a Corporation,

Bankrupt.

To the Clerk of Said Court:

Sir: Please issue certified transcript of record in said matter to consist of transcript of testimony taken on hearing of claim of R. H. Herron Company before referee on the 24th of July, 1912; letters introduced in evidence on said hearing, decree of the referee, order of the United States District Court confirming the decree, statement of account (not the bills) which the R. H. Herron Company filed in support of its claim against the bankrupt, petition for



appeal, bond on appeal, assignment of errors, to be certified under the hand of the clerk and the seal of the Court.

GEO. E. WHITAKER,

Attorney for R. H. Herron Co., Appellant.

[Endorsed]: No. 686—Bank. U. S. District Court, Southern District of California, Southern Division. In the Matter of the Cleveland Oil Co., Bankrupt. Praecipe for Certified Transcript of Record. Filed Feb. 13, 1913, at 15 min. past 11 o'clock A. M. Wm. M. Van Dyke, Clerk. Virgil W. Owen, Deputy. [158]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

IN BANKRUPTCY—No. 686.

In the Matter of the CLEVELAND OIL COMPANY, a Corporation,

Bankrupt.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and fifty-eight typewritten pages, numbered from 1 to 158, inclusive, and comprised in one volume, to be a full, true and correct copy of the Referee's Report on Petition for Review, the Testimony on the hearing of the claim

of R. H. Herron Company before the Referee, the Statement of Account filed by the R. H. Herron Company in support of its claim against the bankrupt, the letters introduced in evidence on said hearing, the Order of the Court Confirming the Report of the Referee, the Petition for Appeal, the Order Allowing the Appeal, the Assignment of Errors on Appeal, and the Bond on Appeal in the above and therein entitled matter, and that the same together constitute the record in said matter upon the appeal of R. H. Herron Company, a corporation, from the Judgment and Order of the Court Confirming the Report of the Referee in said matter as specified in the Praeceptum filed [159] in my office on behalf of said R. H. Herron Company, a corporation, by its attorney of record.

I do further certify that the cost of the foregoing record is \$77.60, the amount whereof has been paid me on behalf of said R. H. Herron Company, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 19th day of February, in the year of our Lord one thousand nine hundred and thirteen and of our Independence the one hundred and thirty-seventh.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [160]

[Endorsed]: No. 2254. United States Circuit Court of Appeals for the Ninth Circuit. R. H. Herron Company, a Corporation, Appellant, vs. William H. Moore, Jr., Trustee in Bankruptcy of the Cleveland Oil Company, a Corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Received March 12, 1913.

F. D. MONCKTON,  
Clerk.

Filed March 13, 1913.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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*In the United States Circuit Court of Appeals, in  
and for the Ninth Circuit.*

IN BANKRUPTCY—No. 686.

In the Matter of the CLEVELAND OIL COM-  
PANY, a Corporation,

Bankrupt.

**Stipulation Extending Time to File Transcript.**

IT IS HEREBY STIPULATED by and between Messrs. Hickcox & Crenshaw, attorneys for William H. Moore, Jr., trustee in bankruptcy of the Cleveland Oil Company, a corporation, bankrupt, and George E. Whitaker, attorney for R. H. Herron & Company, a corporation, that the claimant, R. H.

Herron & Company, may have up to and including the 15th day of March, 1913, in which to file the Transcript on Appeal in the above-entitled proceeding.

Dated February 25, 1913.

ROSS T. HICKCOX,

L. O. CRENSHAW,

Attorneys for William H. Moore, Jr., Trustee in  
Bankruptcy of the Cleveland Oil Co., Bankrupt.

GEO. E. WHITAKER,

Attorney for R. H. Herron & Company.

Dated San Francisco, California, February 27,  
1913.

So ordered:

WM. B. GILBERT,

Senior United States Circuit Judge for the Ninth  
Circuit.

[Endorsed]: 2254. In the United States Circuit Court of Appeals, in and for the Ninth Circuit. In Bankruptcy—No. 686. In the Matter of the Cleveland Oil Company, a Corporation, Bankrupt. Stipulation Extending Time to File Transcript. Filed Feb. 27, 1913. F. D. Monckton, Clerk. Refiled Mar. 13, 1913. F. D. Monckton, Clerk.





United States  
**Circuit Court of Appeals**  
For the Ninth Circuit.

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R. H. HERRON COMPANY, a Corporation,  
Appellant,

vs.

WILLIAM H. MOORE, Jr., Trustee in Bankruptcy of  
the CLEVELAND OIL COMPANY, a Corpora-  
tion,  
Appellee.

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**Supplemental  
Transcript of Record.**

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Upon Appeal from the United States District Court for the  
Southern District of California, Southern Division.

**FILED**

MAY 31 1913



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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R. H. HERRON COMPANY, a Corporation,  
Appellant,

vs.

WILLIAM H. MOORE, Jr., Trustee in Bankruptcy of  
the CLEVELAND OIL COMPANY, a Corpora-  
tion,  
Appellee.

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Supplemental  
Transcript of Record.

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Upon Appeal from the United States District Court for the  
Southern District of California, Southern Division.

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# INDEX OF PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**[Proof of Debt Due R. H. Herron Co.]**

*In the District Court of the United States for the  
Southern District of California, Southern Divi-  
sion.*

**IN BANKRUPTCY.**

**In the Matter of CLEVELAND OIL COMPANY,  
Bankrupt.**

At Los Angeles, in said Southern District of California, on the 22 day of May, 1911, came John M. Sands, of the city of Los Angeles, in the county of Los Angeles, State of California, and made oath and says:

That he is the Vice-president and Treasurer of the R. H. Herron Company, a corporation, incorporated under the laws of the State of California, and carrying on business, and having its office and principal place of business at said city of Los Angeles, county of Los Angeles, State of California, in said Southern District; and that he is duly authorized to make this proof of debt on behalf of said R. H. Herron Company, and says that the said Cleveland Oil Company, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said R. H. Herron Company, a corporation, in the sum of Fourteen Thousand, Eight Hundred Four and 32/100 (\$14,804.32) Dollars;

That the consideration of said debt is as follows:  
Fourteen Thousand Four Hundred Seventeen and

36/100 (\$14,417.36) Dollars, being and representing the principal of a balance due to the said R. H. Herron Company by the said bankrupt on account of goods, wares and merchandise sold and delivered by the said R. H. Herron Company to the said bankrupt at its special instance and request, and the sum of Three Hundred Eighty-six [2\*] and 96/100 (\$386.96) Dollars, being interest charges due and owing upon said principal sum of Fourteen Thousand Four Hundred Seventeen and 36/100 (\$14,417.36) Dollars according to agreement had between the said R. H. Herron Company and the said bankrupt; an itemized account of which showing the various debits and credits is filed herewith, marked Exhibit "A" and expressly made a part of this proof of debt.

That all of the said sum of Fourteen Thousand Eight Hundred Four and 32/100 (\$14,804.32) Dollars is past due and payable.

That included in the above principal sum of Fourteen Thousand Four Hundred Seventeen and 36/100 (\$14,417.36) Dollars are four promissory notes, true and correct copies of which are filed herewith, marked Exhibit "B" and expressly made a part of this proof of debt.

That the total amount of said promissory notes which were given by said bankrupt to the said R. H. Herron Company on account of said debt of Fourteen Thousand Eight Hundred Four and 32/100 (\$14,804.32) Dollars is the sum of Twelve Thousand Seven Hundred Twenty-six and 68/100 (\$12,726.68) Dollars, on which has been paid by said bankrupt the

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\*Page-number appearing at foot of page of original certified Record.

sum of Four Thousand Six Hundred Eighty-five and 85/100 (\$4,685.85) Dollars, leaving a balance due as principal on said promissory notes of the sum of Eight Thousand Forty and 83/100 (\$8,040.83) Dollars.

That no part of said debt of Fourteen Thousand Eight Hundred Four and 32/100 (\$14,804.32) Dollars has been paid; that there are no off sets or counterclaims to same, and that said corporation has not, nor has any person by its order or to the knowledge or belief of said deponent for its use, received any manner of security for said debt from said bankrupt, except Ten (10) Bonds of said bankrupt, numbering from #57 to 66, inclusive, for Five Hundred (500.00) Dollars each, total Five Thousand [3] (5000.00) Dollars, and having possible value of ten (10) cents on the dollar.

That no judgment has been obtained or entered in favor of said R. H. Herron Company and against said bankrupt for said sum of Fourteen Thousand Eight Hundred Four and 32/100 (\$14,804.32) Dollars, or any portion thereof, nor have any notes been taken for the same, except as hereinbefore specified and set forth.

JOHN M. SANDS,

Treasurer of said R. H. Herron Company, a Corporation.

Subscribed and sworn to before me this 22 day of May, 1911.

[Seal]

RALPH BANDINI,

Notary Public, in and for the County of Los Angeles, State of California.

[Endorsed]: No. ———. In the District Court of the United States for the Southern District of California, Southern Division. In the Matter of Cleveland Oil Company, Bankrupt. Proof of Debt. Filed May 22, 1911, at ——— o'clock ——— M. Lynn Helm, Referee. \$14,804.32. Geo. E. Whitaker, Stoner Block, Bakersfield, Cal., Attorney for Creditor. [4]

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*In the United States District Court, Southern District of California, Southern Division.*

IN BANKRUPTCY—No. 686.

In the Matter of the CLEVELAND OIL COMPANY,

A Bankrupt.

**Objections to Claim of R. H. Herron Company.**

William H. Moore, Jr., the duly appointed, qualified and acting trustee of the Estate of the Cleveland Oil Company, a bankrupt, objects to the allowance of the claim of R. H. Herron Company heretofore filed herein, on the following grounds, to wit:

I.

That a petition for the adjudication of said Cleveland Oil Company, a corporation, a bankrupt, was filed in the above-entitled court on the twelfth day of January, 1911.

II.

That within four months preceding the filing of said bankruptcy petition herein, to wit, on the fifteenth day of September, 1910, the said bankrupt, while insolvent, transferred to said R. H. Herron



Company, who was then, and still is, a creditor of said bankrupt, the sum of Two Thousand Dollars, (\$2,000.00) in cash, and said transfer was made to apply upon a pre-existing debt owed by the bankrupt to said creditor, and the effect of said transfer is to give said creditor a greater percentage of its claim than the other creditors of the same class.

### III.

That on or about the thirty-first day of October, [5] 1911, and within four months preceding the filing of said bankruptcy petition herein, said bankrupt, while insolvent, transferred to said R. H. Heron Company, who was then, and still is, a creditor of said bankrupt, certain oil well casing, of the value of Two Thousand Eight Hundred Twenty-three Dollars, Thirty-seven Cents (\$2,823.37), and said transfer was made to apply upon a pre-existing debt owed by the bankrupt to said creditor, and the effect of said transfer is to give said creditor a greater percentage of its claim than other creditors of the same class.

### IV.

That within four months preceding the filing of said bankruptcy petition herein, to wit, on or about the thirty-first day of December, 1910, the said bankrupt, while insolvent, transferred to said R. H. Heron Company, who was then, and still is, a creditor of said bankrupt, two pumps, of the reasonable value of Three Hundred Dollars (\$300.00), and said transfer was made to apply upon a pre-existing debt owed by the bankrupt to said creditor, and the effect of said transfer is to give said creditor a greater per-

centage of its claim than other creditors of the same class.

V.

Said R. H. Herron Company, the said creditor, received said cash and said property with a reasonable cause for believing that a preference was intended to be given it thereby, and said R. H. Herron Company has not surrendered said property so received by it as aforesaid.

WHEREFORE, your trustee prays that the said claim of said R. H. Herron Company be not allowed, unless said preferences be surrendered.

WM. H. MOORE, Jr.,  
Trustee of the Estate of the Cleveland Oil Company,  
a Bankrupt.

HICKCOX & CRENSHAW,  
Attorneys for Trustee. [6]

United States of America,  
Southern District of California,  
County of Los Angeles,—ss.

William H. Moore, Jr., being first duly sworn, upon oath says, that he is the objecting trustee in the above-entitled objections to the claim of R. H. Herron Company, and that the facts stated in his foregoing objections to the claim of said R. H. Herron Company are true.

WM. H. MOORE, Jr.

Subscribed and sworn to before me this 23 day of August, 1911.

[Seal] SAMUEL H. PETERS,  
Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: No. 686. In the United States District Court, Southern District of California, Southern Division. In Bankruptcy. In the Matter of the Cleveland Oil Company, a Bankrupt. Objections to Claim of R. H. Herron Company. Filed Aug. 23, 1911, at 2 P. M. Lynn Helm, Referee. Hickcox & Crenshaw, 712-715 Merchants Trust Bldg., 207 South Broadway, Los Angeles, California, Attorneys for Trustee. [7]

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**[Petition to U. S. District Court for Review of Order  
of Referee Disallowing Claim.]**

*In the District Court of the United States, Southern  
District of California, Southern Division.*

No. 686.

In the Matter of the CLEVELAND OIL COM-  
PANY, a Corporation,

Bankrupt.

To the Honorable OLIN WELLBORN, Judge of  
the District Court of the United States for the  
Southern District of California.

The petition of the R. H. Herron Company, a corporation organized and existing under the laws of the State of California, one of the creditors of said bankrupt, respectfully represents that on the 3d day of October, 1912, manifest error to the prejudice of complainant, was made by the referee of said matter in a finding and order disallowing and expunging the claim of said corporation against said bankrupt from the list of allowed claims upon the Trustee's

record in said case; and in ordering that the claim of the said R. H. Herron Company for the sum of \$14,804.32, as verified and filed with said Referee, be not allowed unless said claimant should surrender and pay to the Trustee of said bankrupt the sum of \$5,123.37, together with interest on the sum of \$2,000.00, at the rate of seven per cent per annum from the 15th day of September, 1910; interest on the sum of \$2,823.37 at the rate of seven per cent per annum from the 31st day of October, 1910; and interest on the sum of \$300.00 at the rate of seven per cent per annum from the 31st day of December, 1910.

The errors complained of are:

FIRST.—That the evidence adduced before said Referee at the hearing of the objections made to the allowance of the said claim so presented by the said R. H. Herron Company [8] against the estate of said bankrupt shows that no preference was received by said corporation.

SECOND.—Said Referee erred in finding that the said R. H. Herron Company had reasonable cause to believe that it was intended thereby to give a preference to it by the payment of said sum in the amounts and at the times above stated.

THIRD.—Said Referee erred in finding from the evidence that the said R. H. Herron Company received any preference by reason of said payments above referred to, or either of them.

FOURTH.—Said Referee erred in finding that any payments made to said corporation by said bankrupt were preferences for any amount.

FIFTH.—Said Referee erred in ordering said

corporation to pay the sum of \$5,123.37, or any sum at all, to the Trustee before its said claim for \$14,-804.32 be allowed.

SIXTH.—Said Referee erred in his conclusions of law from the evidence at said hearing.

WHEREFORE, the R. H. Herron Company prays that it may be decreed by the Court to have its claim against the said bankrupt estate allowed for the full amount thereof, and that it be restored to all things lost by reason of the finding and order of the Referee in said matter.

R. H. HERRON COMPANY,

By GEO. E. WHITAKER,

Its Attorney. [9]

United States of America,  
Southern District of California, Southern Division,  
County of Los Angeles,—ss.

I, J. M. Sands, do depose and say: That I am the Vice-president, Treasurer and General Manager of the R. H. Herron Company, the petitioner mentioned and described in the foregoing petition, and do hereby make a solemn oath that the statements therein are true according to the best of my knowledge, information and belief.

JOHN M. SANDS.

Subscribed and sworn to before me this 12th day of October, 1912.

[Seal]

JACOB B. KISSINGER,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Jan. 5, 1916.



[Endorsed]: No. 686. In the District Court of the United States, Southern District of California, Southern Division. In the Matter of the Cleveland Oil Company, a Corporation, Bankrupt. Petition to Review Order of Referee Disallowing Claim. Filed Oct. 12, 1912, at 10 o'clock, A. M. Lynn Helm, Referee. Geo. E. Whitaker, Stoner Block, Bakersfield, Cal., Attorney for R. H. Herron Co. [10]

### **Summary of Debts and Assets.**

(From the Statements of the Bankrupt in Schedules A and B.)

Schedule A..1	(1)	Taxes and debts due United States . . . .	
“	A..1	(2) Taxes due States, Counties, Districts and Municipalities	
“	A..1	(3) Wages... . . . .	
“	A..1	(4) Other debts preferred by law... . . . .	
“	A..2	Secured claims . . . . .	\$103,271.02
“	A..3	Unsecured claims . . .	34,234.61
“	A..4	Notes and bills which ought to be paid by other parties thereto... . . . .	
“	A..5	Accommodation paper	
		Schedule A, total..	\$137,505.63
Schedule B..1		Real estate . . . . .	\$100,000.00
“	B..2-a	Cash on hand... . . . .	
“	B..2-b	Bills, promissory notes and securities	

Schedule B..2-c	Stock in trade.....
“ B..2-d	Household goods, etc.
“ B..2-e	Books, prints and pictures .....
“ B..2-f	Horses, cows and other animals.....
“ B..2-g	Carriages and other vehicles ....
“ B..2-h	Farming stock and implements ..
“ B..2-i	Shipping and shares in vessels....
“ B..2-k	Machinery, tools, etc..
“ B..2-l	Patents, copyrights and trademarks ..
“ B..2-m	Other personal property .....
“ B..3-a	Debts due on open account... ..
“ B..3-b	Stocks, negotiable bonds, etc. ....
“ B..3-c	Policies of insurance.
“ B..3-d	Unliquidated claims..
“ B..3-e	Deposits of money in banks and elsewhere ..
“ B..4	Property in reversion, remainder, trust, etc.....

Schedule B..5	Property claimed to be excepted .....
“ B..6	Books, deeds and papers ....
	Schedule B, total..\$100,000.00
	EDSON FRANCE, Vice-Prest. Cleveland Oil Co., Petitioner. [11]

**Schedule A—Statement of All Debts of Bankrupt.**

SCHEDULE A (1).

Statement of all Creditors Who are to be Paid in  
Full or to Whom PRIORITY IS SECURED  
by law.

Dollars. Cents.

(1) TAXES AND DEBTS DUE  
AND OWING TO THE  
UNITED STATES—  
CLAIMS WHICH HAVE  
PRIORITY.

Reference to Ledger or Voucher.

Names of Creditors — Resi-  
dence (if unknown, that fact  
must be stated). Where and  
when contracted. Nature and  
consideration of the debt, and  
whether contracted as a part-  
ner or joint contractor; and if  
so, with whom.

(2) TAXES DUE AND OWING  
TO THE STATE OF.....  
OR TO ANY COUNTY,

DISTRICT OR MUNICI-  
PALITY THEREOF.

Reference to Ledger or Voucher.

Names of Creditors. Residence (if unknown, that fact to be stated). Where and when contracted. Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

(3) WAGES DUE WORKMEN,  
CLERKS OR SERVANTS  
TO AN AMOUNT NOT EX-  
CEEDING \$300 EACH,  
EARNED WITHIN  
THREE MONTHS BEFORE  
FILING THIS PETITION.

Reference to Ledger or

Voucher. Names of Creditors. Residence (if unknown, that fact to be stated). Where and when contracted. Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

(4) OTHER DEBTS HAVING  
PRIORITY BY LAW.

Reference to Ledger or Voucher.

Names of Creditors. Residence (if unknown, that fact

to be stated). Where and when contracted. Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so with whom.

Total.....

EDSON FRANCE,  
Vice-Prest. Cleveland Oil Co.,  
Petitioner. [12]

### SCHEDULE A (3).

#### CREDITORS WHOSE CLAIMS ARE UNSECURED.

(N. B.—When the Name and Residence (or Either) of any Drawer, Maker, Endorser or Holder of any Bill, or Note, etc., are Unknown, the Fact Must be Stated, Also the Name and Residence of the Last Holder Known to the Debtor. The Debt Due to Each Creditor Must be Stated in Full, and Any Claim by Way of Setoff Stated in the Schedule of Property.)

Dollars. Cents.

Reference to Ledger or Voucher.

Names of Creditors. Residence (if unknown, that fact must be stated). When and where contracted. Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any



other person; and if so, with whom.

All of the following items were taken from the Report of the Mushet Audit Company, which company made an examination of the books of the Cleveland Oil Company as of September 30, 1910.

Alma Oil Company, Bakersfield, Cal.....	\$ 8.95
Associated Supply, San Francisco, Cal...	1,418.46
Axelson Machine Co., Los Angeles, Cal...	707.08
Bakersfield Iron Works.....	241.21
Bakersfield Hardware Co. ....	57.05
Bennett & Robinson.....	17.00
Bird, H. F.....	26.75
Braun Chemical Company, Los Angeles, Cal....	7.20
Bucker Engraving Company, Los An- geles, Cal. ....	42.12
California Engraving Company, Los An- geles, Cal. ....	39.95
California Market Company, Bakersfield, Cal. ....	40.75
Chanslor Canfield Midway Oil Co.....	79.50
Cheney, H., Bakersfield, Cal.....	198.34
Cooms, L. D., Bakersfield, Cal.....	100.00
D. & B. Pump & Supply Company, Los Angeles, Cal....	55.00
Fairbanks Morse & Company, Los An- geles, Cal. ....	.36
France, W. A., Columbus, Ohio.....	1,460.84
Goode, O. P.....	330.86
Gray, J. E.....	180.00

Grimes-Stassforth Stationery Co., Los Angeles, Cal.....	15.50
Hale-McLeod Oil Company, Los Angeles, Cal.....	21.85
Hawaiian Oil Company..	555.25
Hayden Furniture Company, Bakersfield, Cal....	33.00
Heard & Painter.....	355.85
Hereford Furniture Company.....	14.50
Hackhenner & Company, Bakersfield, Cal.	3.60
Homes Supply Company, Los Angeles, Cal.....	573.56
I. X. L. Blacksmith Shop, Bakersfield, Cal.....	4.25
Kern County Abstract, Bakersfield, Cal..	24.90
Kern County Tel. & Tel. Co., Bakersfield, Cal. ....	13.75
King Lumber Company, Bakersfield, Cal.	97.38
La Bell Oil Company, Los Angeles, Cal...	187.50
Lacy, John, Bakersfield, Cal.....	6.50
Leahy, J. F. ....	8.19
Lucy, J. F., Los Angeles, Cal.....	3.10
McDougal Bros. ....	8.50
McMaster, C. W.....	13.95
MacMurdo, W. R. ....	12.50
[13]	
Midway Fishing Tool Co., Moron, Cal....	120.00
Mission Pharmacy....	2.50
Moron Boiler Shop, Moron, Cal.....	160.00
Moron Lumber Company, Moron, Cal....	25.60
National Supply Company, Los Angeles, Cal.....	7,736.59

Ogden, Lue.....	16.90
O'Reilley & Brown, Bakersfield, Cal.....	163.45
Pacific Coast Mfg. Company, Los Angeles, Cal... ..	791.50
Parsons & Barton.....	44.00
Phoenix Ref., Bakersfield, Cal.....	35.95
Postal Tel. & Tel. Co., Bakersfield, Cal...	12.41

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Total.....16,073.95

EDSON FRANCE,

Vice-Pres. Cleveland Oil Co.,

Petitioner. [14]

### CREDITORS WHOSE CLAIMS ARE UNSECURED.

(N. B.—When the Name and Residence (or Either) of Any Drawer, Maker, Endorser or Holder of Any Bill or Note, etc., are Unknown, the Fact Must be Stated, and Also the Name and Residence of the Last Holder Known to the Debtor. The Debt Due to Each Creditor Must be Stated in Full, and Any Claim by Way of Setoff Stated in the Schedule of Property.)

Dollars. Cents.

Reference to Ledger or Voucher.

Names of Creditors. Residence (if unknown, that fact must be stated). When and where contracted. Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or

joint contractor with any other  
person; and if so, with whom.

Forward.....	16,073.95
Ross & Reilley.....	49.30
Silver & Kaar, Bakersfield, Cal.....	102.75
Sprague, F. E. & Bros. ....	92.00
Standard Oil Company, Fresno, Cal....	304.27
Stratton Water Company, Fellows, Cal...	773.92
Union Oil Company, Los Angeles, Cal...	763.81
Union Tool Company, Los Angeles, Cal...	65.25
United Veg. Co... ..	26.45
Wallace Pump Works.....	52.00
Wood Bros. Transfer.....	32.00
<hr/>	
Total.....	18,335.70

#### BILLS PAYABLE:

Merchants Bank & Trust Co., Los Angeles, Cal.....	5,000.00
Citizens National Bank, Los Angeles, Cal.....	5,352.68
California National Supply, Los Angeles, Cal... ..	3,723.91
King Lumber Company, Bakersfield, Cal.	322.32
<hr/>	
Total.....	14,398.91

Spicer, C. C. and Sweet, Geo. T., Los Angeles, Cal.....	1,000.00
Batchelder, Wm. J., Los Angeles, Cal....	500.00
Total.....	34,234.61

EDSON FRANCE,

Vice-Prest. Cleveland Oil Co.,

Petitioner. [15]

SCHEDULE A (4).

LIABILITIES ON NOTES OR BILLS DIS-  
COUNTED WHICH OUGHT TO BE PAID  
BY THE DRAWERS, MAKERS, ACCEPT-  
ORS OR INDORSERS.

N. B.—The Dates of the Notes or Bills, and When Due, With the Names, Residences and the Business or Occupation of the Drawers, Makers or Acceptors Thereof, are to be Set Forth Under the Names of the Holders. If the Names of the Holders are not Known, the Name of the Last Holder Known to the Debtor Shall be Stated, and His Business and Place of Residence. The Same Particulars as to Notes or Bills, on Which the Debtor is Liable as Indorser.

Dollars. Cents.

Reference to Ledger or Voucher.

Names of holders so far as known. Residence, (if unknown, that fact must be stated). Place where contracted. Nature of liability, and whether contracted as partner or joint contractor with any other person; and if so, with whom.

Total....

EDSON FRANCE,  
Vice-Prest. Cleveland Oil Co.,  
Petitioner. [16]



## SCHEDULE A (2).

## CREDITORS HOLDING SECURITIES.

(N. B.—Particulars of Securities Held, With Dates of Same, and When They were Given, to be Stated Under the Names of the Several Creditors, and Also Particulars Concerning Each Debt, as Required by the Acts of Congress Relating to Bankruptcy; and Whether Contracted as Partner or Joint Contractor With Any Other Person, and if so, With Whom.)

Dollars. Cents.

Reference to Ledger or Voucher.

Names of Creditors. Residence (if unknown, that fact must be stated). Description of securities. When and where debts were contracted. Value of securities.

Merchants Bank & Trust Company, Trustee, first mortgage bonds.....\$83,500.00

M. J. Monnette, note bearing date October 18, 1909, upon which there remains unpaid..... 4,997.53

The above obligation is secured by \$10,000 in first mortgage bonds.....:.....

All of the above figures are taken from the Report of the Mushet Audit Company, which company audited the books of the Cleveland Oil Company as of September 30, 1910.

R. H. Herron & Company; account se-

cured by \$5,000 in first mortgage  
bonds..... 14,773.49

This is the amount stated by the R. H.  
Herron Company as owing to them;  
we have no means of ascertaining its  
correctness.

Total.....\$103,271.02

EDSON FRANCE,

Vice-Prest. Cleveland Oil Co.,

Petitioner. [17]

### SCHEDULE A (5).

#### ACCOMMODATION PAPER.

N. B.—The Dates of the Notes or Bills, and When  
Due With the Names and Residences of the  
Drawers, Makers and Acceptors Thereof, are to  
be Set Forth Under the Names of the Holders.  
If the Bankrupt be Liable as a Drawer, Maker,  
Acceptor or Indorser Thereof, It is to be Stated  
Accordingly. If the Names of the Holders are  
not Known, the Name of the Last Holder  
Known to the Debtor Should be Stated, With  
His Residence. Same Particulars as to Other  
Commercial Paper.

Dollars. Cents.

Reference to Ledger or Voucher.

Name of holders. Residence  
(if unknown that fact must be  
be stated). Names and resi-  
dences of persons accommo-  
dated. Place where contracted.  
Whether liability was contracted

as partner or joint contractor, or  
with any other person; and if so,  
with whom.

Total.....

EDSON FRANCE,  
Vice-Prest. Cleveland Oil Co.,  
Petitioner.

### OATH TO SCHEDULE A.

United States of America,  
Southern District of California,—ss.

On this 16th day of March, A. D. 1911, before me,  
personally came Edson France, Vice-Pres. Cleveland  
Oil Company, the person mentioned in and who sub-  
scribed to the foregoing Schedule, and who, being  
by me first duly sworn, did declare the said Schedule  
to be a statement of all debts, in accordance with the  
acts of Congress relating to Bankruptcy.

[Seal] CHARLES CLYDE SPICER,  
Notary Public in and for the County of Los Angeles,  
State of California. (Official Character.) [18]

### **Schedule B—Statement of All Property of Bankrupt.**

#### SCHEDULE B (1).

#### REAL ESTATE.

Dollars. Cents.

Location and description of all real  
estate owned by debtor, or held  
by him. Incumbrances thereon,  
if any, and dates thereof. State-  
ment of particulars relating  
thereto.

10 acres owned in fee;

15 acres leased from the Volcan Oil Company at 25% royalty;  
 25 acres leased from the California Kern Oil Company at 16- $\frac{2}{3}$ % royalty: All being in the North Half (N.  $\frac{1}{2}$ ) of Section Eight (8), Township Twenty-nine (29) South, Range Twenty-eight (28) East, M. D. B. & M., Kern County, California, together with buildings, machinery, oil drilling equipments, casing, tools and oil on hand..... \$100,000.00

All of the above property is subject to a mortgage and bond issue of \$100,000, of which bonds \$83,500 are outstanding and an additional \$15,000 in bonds are in the hands of creditors as collateral security as shown by Schedule A (2)

Total.... \$100,000.00

EDSON FRANCE,  
 Vice-Prest. Cleveland Oil Co.,  
 Petitioner. [19]

SCHEDULE B (2).  
 PERSONAL PROPERTY.

Dollars. Cents.

A. Cash on hand.....  
 B. Bills of Exchange promissory notes, or securities (each to be set out separately)....

- C. Stock in trade in ——— business  
of at ——— of the value of..
- D. Household goods and furniture,  
household stores, wearing ap-  
parel and ornaments of the  
person, viz. ....
- Total....

EDSON FRANCE,  
Vice-Prest. Cleveland Oil Co.,  
Petitioner. [20]

SCHEDULE B (2) CONTINUED.  
PERSONAL PROPERTY.

Dollars. Cents.

- E. Books, prints and pictures, viz.
- F. Horses, cows, sheep and other  
animals (with number of  
each), viz.
- G. Carriages and other vehicles,  
viz.
- H. Farming stock and implements  
of husbandry, viz.

Total.....

EDSON FRANCE,  
Vice-Prest. Cleveland Oil Co.,  
Petitioner. [21]

SCHEDULE B. (2) CONTINUED.  
PERSONAL PROPERTY.

Dollars. Cents.

- I. Shipping and shares in vessels,  
viz:



- K. Machinery, fixtures, apparatus and tools used in business, with the place where each is situated, viz.

All machinery, fixtures and tools owned by the company are situated on the real estate described in Schedule B (1).

- L. Patent, copyrights and trademarks, viz.

- M. Goods or personal property of any other description, with the place where each is situated, viz.

Total.....

EDSON FRANCE,  
Vice-Prest. Cleveland Oil Co.,  
Petitioner. [22]

SCHEDULE B (3).  
CHOSSES IN ACTION.

Dollars. Cents.

- A. Debts due petitioner on open account.
- B. Stock in incorporated companies, interest in joint stock companies, and negotiable bonds.
- C. Policies of Insurance.
- D. Unliquidated Claims of every nature with their estimated value.

E. Deposits of money in banking  
institutions and elsewhere.

Total.....

EDSON FRANCE,  
Vice-Prest. Cleveland Oil Co.,  
Petitioner. [23]

### SCHEDULE B (4).

PROPERTY IN REVERSION, REMAINDER  
OR EXPECTANCY, INCLUDING PROP-  
ERTY HELD IN TRUST FOR THE  
DEBTOR, OR SUBJECT TO ANY POWER  
OR RIGHT TO DISPOSE OF OR TO  
CHARGE.

N. B.—A Particular Description of Each Interest  
must be Entered, if All, or Any of the Debtor's  
Property has been Conveyed by Deed of Assign-  
ment or Otherwise, for the Benefit of Creditors,  
the Date of Such Deeds Should be Stated, the  
Name and Address of the Person to Whom the  
Property was Conveyed, the Amount Realized  
from the Proceeds Thereof, and the Disposal of  
the Same, as far as Known to the Debtor.

General Interest.	Particular Description.	Supposed Value of my Interest.
		Dollars. Cents

Interest in land.

Personal property.

Property in money, stocks, shares,  
bonds, annuities, etc.

Rights and powers, legacies and be-  
quests.

---

Total.....

Property Heretofore Conveyed for the Benefit of Creditors.

Amount Realized from Proceeds of Property Conveyed.

What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.

What sum or sums have been paid to counsel, and to whom for services rendered or to be rendered in this bankruptcy.

Total . . .

EDSON FRANCE,  
Vice-Prest. Cleveland Oil Co.,  
Petitioner. [24]

### SCHEDULE B (5).

A Particular Statement of the Property Claimed as Exempted from the Acts of Congress Relating to Bankruptcy, Giving Each Item of Property and Its Valuation; and if Any Portion of It is Real Estate, Its Location, Description and Present Use.

Dollars. Cents.

Military uniforms, arms and equipments.

Property claimed to be exempted by State Laws; its valuation; whether real or personal; its de-

scription and present use; and  
reference given to the statute of  
the State creating the exemption.

Total. . . .

EDSON FRANCE,  
Vice-Prest. Cleveland Oil Co.,  
Petitioner. [25]

SCHEDULE B (6).

BOOKS, PAPERS, DEEDS AND WRITINGS  
RELATING TO BANKRUPT'S BUSINESS  
AND ESTATE.

The following is a true list of all books, papers, deeds and writings relating to my trade, business dealings, estate and effects, or any part thereof, which at the date of this petition, are in my possession, or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit or advantage; and also of all others which have been heretofore, at any time, in my possession or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books:

Deeds:

Papers:

EDSON FRANCE,  
Vice-Prest. Cleveland Oil Co.,  
Petitioner.

OATH TO SCHEDULE B.

United States of America,  
Southern District of California,—ss.

On this 16th day of March, A. D. 1911, before me, personally came Edson France, Vice-Pres. of Cleveland Oil Co., the person mentioned in and who subscribed to the foregoing schedule and who, being by me first duly sworn, did declare the said Schedule to be a statement of all estate, both real and personal, in accordance with the Acts of Congress relating to bankruptcy.

[Seal] CHARLES CLYDE SPICER,  
Notary Public in and for the County of Los Angeles,  
State of California.

(Official Character.) [26]

[Endorsed]: No. 686 — Bankruptcy. United States District Court, Southern District of California, Southern Division. In the Matter of Cleveland Oil Company, Bankrupt. Petition by Debtor With Schedules A and B. (Schedules must be Filed in Triplicate.) Filed Mar. 22, 1911, at 10 min. past 3 o'clock P. M. E. H. Owen, Clerk. C. E. Scott, Deputy. Charles Clyde Spicer, Attorney for Petitioner. [27]



**[Trustee's Exhibit No. 3.]**

AN AMERICAN PAPER FOR THE AMERICAN  
PEO——

—— ANGELES (CUT) EX——

LOS ANGELES, DECEMBER 20, 1910.

DIVIDENDS EXCEED PROFITS BY \$6500.

FACT CLEVELAND OIL CO. STOCKHOLD-  
ERS COULDN'T UNDERSTAND VERI-  
FIED BY EXPERT.

LAX METHODS CHARGED.

MEN SERVING AS DIRECTORS WITHOUT  
AUTHORITY AMONG ILLEGAL ACTS  
CLAIMED.

A detailed report on the affairs of the Cleveland Oil Company, whose preparation followed the demands of dissatisfied stockholders for an investigation, was made public yesterday and presented an astonishing narrative of lax methods.

The report, which was compiled by W. C. Mushet, an expert accountant, was read yesterday to about 150 stockholders, who met in one of the Stock Exchange rooms. It comprises more than fifty typewritten pages and goes exhaustively into the history of the company.

The fact which seemed to impress the stockholders as most significant was that there were two payments of dividends aggregating more than \$9000 in ten months, whereas the profits of the company during that time were about \$2500.

## USE STOCK TO PAY DIVIDENDS.

As dividends, according to legal regulations, can only be paid from profits, it appears, and the report so states, that the directors of the Cleveland Oil Company paid a considerable sum from the sale of stock for this purpose. [28]

The mismanagement or lack of management extended over a long period, according to the report. Men served as directors who had never been elected as such, and there were instances cited where only two directors had taken important action with respect to the business of the concern.

The records of the issues of stock were not in keeping with legal requirements and the report showed that the stock books did not check up with the amount of stock disposed of.

Several officers of the company had stock accounts with the company and were in possession of stock that had not been paid for. This condition had been permitted by the directors, said the report.

## INVESTORS DISCONTENTED.

The origin of yesterday's expose was the insistence of stockholders about two months ago that the company be investigated. Their discontent arose over the fact that no dividends had been paid recently, although the reports indicated that the company was producing oil.

The chairman of the stockholders' meeting appointed five men who, in turn, engaged the services of the expert accountant. Requests have been made from time to time that the report be produced, but

it was not until yesterday that the stockholders knew all the facts.

At one time the stock was selling on the exchange as high as 55 cents a share. The last quotation was \$10 per 1,000 shares. [29]

[In pencil:] H—Calu 1260

12-20-1910.

### MINING A——

## AUDITOR FINDS FRAUD IN CLEVELAND AFFAIRS.

## OIL COMPANY WRECKED BY PROMOTERS REFUSES TO REPORT TO VICTIMS AND IS EXPOSED.

The affairs of the Cleveland Oil Company under examination by expert accountants, prove to be in a deplorable condition, with scarcely anything favorable for the stockholders and with the stamp of fraud and dishonesty in evidence throughout. A report of the stock exchange committee read yesterday at the close of the call showed that the Cleveland's accounts were inaccurate, its prospectus untrue, that it had paid in dividends more than its earnings, and that among other discrepancies its directors had made over to themselves large blocks of stock at a very low price.

The committee's report was made possible only after the exchange had been put to a great deal of trouble.

The Cleveland directors were, the committee states, to report as far back as October 1 on the affairs of

the company. But they failed to do so. Then several other dates were set and ignored by the Cleveland people. Finally one day last week was set for the report, but the Cleveland people did not show up.

The meeting yesterday was open to the public and was called by Edward Grak, a Cleveland stockholder, who said the stockholders had been kept in the dark and unshed light. Don Dickinson of the exchange was appointed chairman, and Charles P. Sutton secretary. The report of the investigation committee was read by Broker Sullivan. [30]

Mr. Sullivan said the committee appointed the Mushet Auditing Company to examine and report on the books of the Cleveland. He read from this report excerpts showing where the Cleveland was in bad financial and moral condition. The prospectus was first picked to pieces and found, said the auditing company, "inaccurate." Here the production was set at 300 barrels daily in November. Mr. Mushet showed by the books where the ten months preceding July, 1910, gave a total production of only 8000 barrels after royalty was deducted.

The next head in the report covered "assignments to the Cleveland Oil Company by its directors" of leases and so forth. W. A. France, was frequently mentioned in these assignments and involved large blocks of stock, in payment therefor, at 15 cents a share.

### ORDERED TO VACATE.

The report then showed where the leases were forfeited and the Cleveland was ordered to vacate its



Kern river property for failure to live up to its contracts of development and payment of royalty.

At a meeting of directors of the Cleveland, the report stated, business of the company was turned over to two lone members of the board, namely, T. M. Montgomery and W. J. Bachelder. France and his associates withdrew on plea that business demanded their presence elsewhere.

The minutes of following meetings revealed the fact that there was frequent transfers of stock showing also where treasury stock had been donated contrary to law. At one of these strange meetings, attended by the two lone directors, it was moved by Montgomery and seconded by Bachelder that Montgomery take charge of the plant in the field at \$200 a month and receive 10,000 shares of stock for the privilege of serving his own company. [31]

The question of Cleveland dividends was next discussed in the report. "Were the dividends paid from earnings or from capital?" is the head of this chapter.

The report showed that two dividends were paid, amounting to \$9641. Receipts were \$13,000, expenses \$4999, and gross receipts \$8000. That the gross receipts were not sufficient for dividends was emphasized in the report.

Bills fell due with no money to pay them. It was then that the moving spirits of the company had to dig up \$25,000. In a quiet meeting of directors it was reported that G. G. Gillette, former vice-president of the Cleveland; W. A. France, its president, and Secretary Bachelder offered to "loan" the com-



pany on promise of stock and bonds therein the sum of \$25,000. The "loan" was made in September, 1910, says the Mushet report. [32]

[Endorsed]: Cleveland Oil Co. U. S. District Court. No. 686. Trustee —'s Exhibit No. 3. Filed July 25, 1912. Helm, Referee. [33]

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### **[Trustee's Exhibit No. 4.]**

#### **OIL OFFICIAL ARRESTED.**

**T. M. MONTGOMERY OF CLEVELAND COMPANY BROUGHT TO CITY FROM BAKERSFIELD.**

#### **MISUSE OF MAILS CHARGE.**

Thomas M. Montgomery, treasurer of the Cleveland Oil Company, was brought to this city today in charge of Bert Franklin, deputy United States marshal, from Bakersfield, where he was arrested, charged with using the mails in a scheme to defraud.

He was taken into custody in connection with the alleged swindling operations of the promoters of the concern, which was raided last Wednesday, when W. J. Batchelder and G. G. Gillette were arrested.

Montgomery was arraigned before William M. Van Dyke, United States Commissioner, and furnished \$5000 bail to appear for an examination Dec. 30, the same date set for the hearing of testimony respecting the operations of Gillette and Batchelder.

#### **FOUND ON HUNTING TRIP.**

Montgomery and a party of friends were on a hunting trip at a lake 30 miles west of Bakersfield,

and Deputy Marshal Franklin drove 72 miles in an automobile yesterday and followed the gun shots of hunters around the shores of the lake until late in the afternoon before finding his man.

The arrests are part of a plan on the part of the Government to eliminate stock jobbing concerns under a new law recently passed.

This new act prohibits the sending through the mails of any literature or information respecting companies promoted for purposes of fraud. [34]

#### NEW RULING ON MAILS.

Formerly it was necessary that the letters in question should convey false intelligence before the Government could take a hand in the matter. Now, however, if fraud can be proved against the officers of the company, any information respecting the concern or its operations, whether true or not, is barred from the mails.

The Cleveland Oil Company was made defendant in a civil suit filed today in the Superior Court by William Button to recover on a note for \$5352.68, signed by W. C. France, as president; W. J. Batchelder, as secretary, and Thomas M. Montgomery, as treasurer.

From Los Angeles Express December 23rd, 1910.

[Endorsed]: U. S. District Court. No. 686. Trustee Exhibit No. 4. Filed July 25, 1912. Helm, Referee. [35]

**[Trustee's Exhibit No 5.]**

Los Angeles, California, October 18th, 1910.

Mr. J. O. Scott, District Manager,

Taft, California.

Dear Sir:

The Cleveland Oil Company owe us considerable money and they are not in position to supply the ready cash. Their stock is almost worthless from a stock market view, the last sales being passed at  $2\frac{3}{4}\text{¢}$ . They are endeavoring to arrange the Company on a good financial basis, but that will take some time. They have arranged to deliver us a string of 10" 40# Casing on the well they are drilling in the Midlands, and we have promised to give them credit when delivered to our stock at Moron, at list less 25%.

The thought occurs to me that the Corrigan Oil Company have to furnish a string of Casing of this size and weight to the Kanawha Oil Company. In view of this make a personal visit to the lease where the Casing is located, inspect it and see if it is such as we could honestly deliver to the Kanawha Oil Co. in accordance with our contract. In that case, you can understand the Corrigan Oil Company would be saving a very considerable hauling charge on the stock they have at McKittrick, and that we can very easily dispose of our stock at McKittrick. In all, it might mean a saving to our Co. of \$250 to \$300. This conversation I had with Mr. France, who tells me that the name of the man on the lease, is Ware, but he also made mention of a Mr. Becker as being familiar with the conditions on the property. Therefore,

meet one of these gentlemen, inspect the Casing and I will leave it entirely with you as to whether it is Casing that we can deliver to the Kanawaha Oil Co. If it is, have it delivered to their lease instead of to our stocks at Moron, for you understand we buy the Casing delivered.

Yours very truly,

JOHN M. SANDS. [36]

[Endorsed]: U. S. District Court. No. 686.  
Trustee ——'s Exhibit No. 5. Filed July 25, 1913.  
Helm, Referee. [37]

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**[Trustee's Exhibit No. 7.]**

Los Angeles, California, August 6th, 1910.

Cleveland Oil Co.

Mr. Geo. W. Church, Manager.

Oil Well Supply Co.,

Bakersfield, California.

Dear Sir:

We have yours of the 5th inst. Communicate with this office before delivering any great amount of goods to the above Company. They are owing us about \$20,000.

Yours very truly,

JOHN M. SANDS.

JMS/R.

U. S. District Court. No. 686. Trustee ——'s  
Exhibit No. 7. Filed July ————. [38]

**[Trustee's Exhibit No. 6.]**

1260

Los Angeles 9/21/1910.

Cleveland Oil Company.

Mr. J. L. Scott, Division Manager,

Mr. Geo. W. Church, Manager, Bakersfield,

Mr. E. C. Kellermeyer, Manager, Taft,

Mr. H. W. David, Manager, Maricopa,  
California.

Gentlemen:

This Company has about all the credit we care to extend them; in fact we don't care to have it increased over \$50.00 between the several stores addressed above. The information is sent you so that you may be on your guard and if they should ask for deliveries in excess of this amount, communicate with this office, and those at the Los Angeles in charge of credit, should get the cash before authorizing delivery.

With this communication, all are posted and there is no reason why instructions in connection with this account should miscarry.

Yours very truly,

R. H. HERRON CO.,

Affiliated With the OIL WELL SUPPLY CO. of  
Pittsburgh, Penn.

JOHN M. SANDS,

Treasurer.

JMS/R.

[Endorsed]: U. S. District Court. No. 686.  
Trustee ——'s Exhibit No. 6. Filed July 25, 1912.  
Helm, Referee. [39]



**[Notes of Union Oil Co.]**

Los Angeles, Cal., May 9, 1910.

[In ink:] 108.

[In pencil:] 9450  
\$4052.79

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[In pencil:] 4147.29.

Four months after date, without grace We  
 promise to pay to the order of R. H. Herron  
 Co. Four thousand Fifty-two.....79/100  
 Dollars, for Value received, with interest  
 (CUT) from date at the rate of 7 per cent per an-  
 num until paid. Principal and interest  
 payable in U. S. GOLD COIN., at 427 H.  
 W. Hellman Bldg. and in case suit is insti-  
 tuted to collect this note or any portion  
 thereof, we promise to pay such additional  
 sum as the Court may adjudge reasonable as  
 Attorney's fees in said suit.

[In red ink:] 8356.

CLEVELAND OIL COMPANY.

W. A. FRANCE,

Pres.

W. J. BATCHELDER,

Aug. 31, 1910.

Secy.

No. ——. Due Sept. 10, 1910.

U. S. (Shield) Bond. No. 101.

Stamped across the face of the Note, enclosed within border, and partially blurred, is the following:

Correction PAID SEP 10 1910 FIRST NATION BANK LOS ANGELES CAL
---

[Endorsed on Back:] Pay to the Order of Oil Well Supply Co. Endorsement Cancelled. R. H. Herron Co. John M. Sands. Endorsement Cancelled Oil Well Supply Co. Louis Brown, Treasurer. Endorsement Cancelled. Pay to the Order of Any Bank, Banker or Trust Co. Aug 26, 19, the First National Bank of Pittsburgh, Pa. F. H. Richard, Cashier. Collection Department. [40]

[In pencil:] OK. WHL.

[In ink:] 116.

\$2868.15.

Los Angeles, California, May 23 — 1910.

Ninety days after date, without grace we — promise to pay to the order of (CUT) Ourselves Twenty-eight hundred & sixty eight & 15/100 Dollars, for Value Received, with interest from date at the rate of — 6 — per cent per annum until paid. Principal and interest payable in U. S. GOLD COIN, at Los Angeles California and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional

sum as the Court may adjudge reasonable as Attorney's fees in said suit.

[Seal] CLEVELAND OIL COMPANY.

By W. A. FRANCE, Pres.

By W. J. BATCHELDER, Secy.

No. 24347 Due 8/21/10.

U. S. (Shield) Bond. No. 101.

[Endorsed on Back]: Cleveland Oil Company by W. A. France, Pres., by W. J. Batchelder, Secy.

For value received, I, R. H. Herron Co., hereby waive presentment, demand, notice, protest and notice of protest and guarantee the payment of this note at maturity.

R. H. HERRON CO.

WALTER H. LYNN,

Secretary. [41]

[In ink:] 143. 7462 int \$327293. 4117. Oct. 24  
\$3,198.31. Los Angeles, Cal., June 23, 1910.

Four months after date, without grace We promise to pay to the order of R. H. Herron Co. Thirty-one Hundred Ninety-eight.....31/100 Dollars, for Value (CUT.) received, with interest from date at the rate of 7 per cent per annum until paid. Principal and interest payable in U. S. GOLD COIN, at ofc. R. H. Herron Co. L. A. and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the Court may ad-

judge reasonable as Attorney's fees in said suit.

CLEVELAND OIL CO. 74398

By W. A. FRANCE,

Pres.

W. J. BATCHELDER,

Secy.

[In pencil:] 45.26

24th

No. 5. Due Oct. ~~23~~, 1910.

U. S. (Shield) Bond. No. 101.

Endorsed on face of Note is the following: Enclosed within circle:—capital letter (P). Enclosed within border, stamped:—PAID OCT 24 1910. Collection Dept. CITIZENS NAT'L BANK Los Angeles, Cal.

(Endorsed on back is the following: (54.58. Pay to the Order of the Oil Well Supply Co. Endorsement Cancelled. R. H. Herron Co. John M. Sands, Treasurer. Endorsement Cancelled. Oil Well Supply Co. Louis Brown, Treasurer. Endorsement Cancelled. Pay to the Order of Any Bank, Banker or Trust Co. This and All Prior Endorsements Guaranteed. Coll. No. 17924. The Bank of Pittsburgh N. A. W. F. Bickel, Cashier. Sep. 28, 1910. [42]

172. \$2607.43 Los Angeles, Cal., July 16, 1910.

On November 15th 1910 after date, without grace we or either of us promise to pay to the order of R. H. Herron Co Twenty Six Hundred Seven and 43/100—Dollars, for maturity  
Value received, with interest from ~~date~~ at

the rate of seven per cent per annum until paid. Principal and interest payable in U. (CUT.) S. GOLD COIN., at office R H Herron Co Los Angeles Cal and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

CLEVELAND OIL CO.

[Seal of Cleveland Oil Co.]

By W. J. BATCHELDER, Secy.

A

THOS. M. MONTGOMERY, Treas.

[In pencil:] 115.

[In red ink:] 9218.

No. — Due Nov. 15-10-29

U. S. (Shield) Bond. No. 101.

(Endorsed across the front of Note, stamped within circle, is the following:)

NOV 15 1910 LOS ANGELES CAL  
COMMERCIAL NATIONAL BANK. Collection  
Dept.

[Endorsed on Back:] Pay to the Order of Oil Well Supply Co. Endorsement Cancelled. R. H. Herron Co. John M. Sands, Treasurer. Endorsement Cancelled. Oil Well Supply Co. Louis Brown, Treasurer. Endorsement Cancelled. Pay First National Bank, Pittsburg, Pa, or order. Previous Endorsements Guaranteed. First National Bank, McKeesport, Pa. Charles A. Tawney, Cashier. 1280. Pay to the Order of Any Bank, Banker or Trust Co.,



Oct. 20, 1910. The First National Bank of Pittsburgh, Pa. F. H. Richard, Cashier. Collection Department. [43]

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**[Certificate of Clerk U. S. District Court to  
Supplemental Transcript of Record, etc.]**

*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

IN BANKRUPTCY—No. 686.

In the Matter of CLEVELAND OIL COMPANY, a  
Corporation,

Bankrupt.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing typewritten pages, numbered from 1 to 43, inclusive, and comprised in one volume, to be a full, true and correct copy of the Proof of Debt filed by the R. H. Herron Company, the Petition for Review of Referee's Report, Trustee's Exhibit 6, being a letter dated September 21, 1910, Trustee's Exhibit 7, being a letter dated August 6, 1910, Trustee's Exhibit 5, being a letter dated October 18, 1910, Trustee's Exhibits 3 and 4, being newspaper clippings, four notices of Cleveland Oil Company to R. H. Herron Company, Summary of Schedules and Schedule B, and Objections of Trustee to the Claim of the R. H. Herron Company, and that the same together with the Transcript on Appeal issued and certified to on February 19, 1913, constitute the Transcript of the Record on Appeal to the [44] United States

Circuit Court of Appeals for the Ninth Circuit, in said cause.

I do further certify that the cost of the foregoing Supplemental Record is \$19.70, the amount whereof has been paid me on behalf of said R. H. Herron Company, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 10th day of May, in the year of our Lord one thousand nine hundred and thirteen, and of our Independence the one hundred and thirty-seventh.

[Seal] WM. M. VAN DYKE,  
Clerk of the District Court of the United States of  
America, in and for the Southern District of  
California.

By Chas. N. Williams,  
Deputy Clerk. [45]

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[Endorsed]: No. 2254. United States Circuit Court of Appeals for the Ninth Circuit. R. H. Herron Company, a Corporation, Appellant, vs. William H. Moore, Jr., Trustee in Bankruptcy of the Cleveland Oil Company, a Corporation, Appellee. Supplemental Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed May 12, 1913.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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IN THE

United States Circuit  
Court of Appeals

FOR THE NINTH CIRCUIT.

R. H. HERRON COMPANY, a Cor-  
poration,

Appellant,

vs.

WILLIAM H. MOORE, Jr., Trustee  
in Bankruptcy of the Cleveland Oil  
Company, a Corporation,

Appellee.

POINTS AND AUTHORITIES OF THE R. H.  
HERRON COMPANY, CLAIMANT AND AP-  
PELLANT.

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STATEMENT OF FACTS

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Briefly outlined the facts are as follows:

On the 12th day of January, 1911, an involun-  
tary petition in bankruptcy was filed against the  
above entitled bankrupt, the Cleveland Oil Com-  
pany, and on February 20th, 1911, the company

was duly adjudicated a bankrupt upon the said petition.

The R. H. Herron Company after the adjudication filed a claim against the bankrupt estate for the sum of \$14,804.32, consisting of an open account for \$6376.53 for goods, wares and merchandise sold and delivered by the claimant to the bankrupt and the balance for the sum of \$8427.79 and evidenced by four promisory notes made by said bankrupt and due respectively August 21, September 10, October 24 and November 15, 1910.

It appeared that on September 15th, 1910, the bankrupt had paid to the R. H. Herron Company the sum of \$2000.00 on account; that on October 31st, 1910, the bankrupt returned to the company certain oil well casing of the value of \$2823.37 in part payment of its indebtedness; and that on the 31st day of December 1910, the bankrupt returned to the company two pumps of the value of \$300.00 also in part payment of its indebtedness. The trustee in bankruptcy objected to the claim of the R. H. Herron Company on the ground that these payments constituted preferences. The Referee decided that the payment of the \$2000.00 and the transfers of the property to the company were all preferences; he found that the claimant had reasonable cause to believe that a preference was intended, and he held that the claim of the company for \$14,804.32 be not allowed unless the company surrender to the Trustee the sum of \$5123.37 together with interest on the various

sums above mentioned from the time they were credited to the bankrupt by the company. On a review of this report of the Referee by the Hon. Olin Wellborn, District Judge, the finding and decision of the Referee were confirmed.

It is from the decree of the District Court affirming the finding and decision of the Referee that this appeal is prosecuted.

### PRELIMINARY CONSIDERATIONS

The sole question for determination here is whether at the time of the payment of the money and the transfer of the property by the Cleveland Oil Company to the R. H. Herron Company, the latter had reasonable cause to believe that the payment or transfers would effect a preference. Payments or transfers within four months from the filing of the petition in bankruptcy are valid unless the creditor receiving them had at the time reasonable cause to believe that they would effect a preference.

This is the express provision of the Bankruptcy Act.

Bankruptcy Act, Section 60b.

It is to be remembered that the creditor **at the time** of the payment or transfer must have had reasonable cause to believe a preference was intended.

In re Onimette, 18 Fed. Cas., 913.

In re Sayed, 26 Am. Bank Rep., 444, 447,  
S. C. 185 FED., 962.

Hicks v. Longstreet, 6 Am. Bank Rep.,  
178.



Therefore, the question is whether at the time of the payment and transfers made herein, the R. H. Herron Company had reasonable cause to believe a preference was intended.

In determining this question the rule is firmly settled that the burden of proof is upon the party claiming that the transfers constituted a preference.

“The law presumes that the payments made by  
“the bankrupt were legal and the burden of  
“proof is on the trustee to overcome this pre-  
“sumption.”

Starbuck v. Gebo, 48 N. Y. Misc., 333, per  
Rockwood, J.

“It has never been denied,” said Miller, J., “so  
“far as we are advised that it is necessary for the  
“assignee of the bankrupt in attacking such a  
“conveyance to prove the existence of this rea-  
“sonable cause of belief of the debtor’s insolv-  
“ency in the mind of the preferred party.”

Barbour v. Priest, 103 U. S., 293.

This rule is supported by a vast array of  
authority.

Cullinane v. State Bank, 123 Ia., 340.

Borden v. Dresser, 98 Me., 519.

Halbert v. Pranke, 91 Minn., 204.

Powel v. Gate City Bank, 178 Fed., 609.

Greene v. Montana Brewing Co., 28  
Mont., 380.

Upson v. Mt. Morris Bank, 103 N.Y. App.  
Div., 367.

Jackson v. Valley, etc., Co., 108 Va., 714.

Calhoun Co. Bk. v. Cain, 152 Fed., 983.

Stevens v. Oscar Holway Co., 156 Fed.,  
90.

In re Leech, 171 Fed., 622.

And the burden is on the Trustee to prove by evidence establishing more than a mere suspicion that the bankrupt intended to prefer a creditor when the payment was made and that the creditor knew or had reasonable cause to believe that such preference was intended.

Reber v. Shulman, 179 Fed., 574, aff'd  
183 Fed., 564.

Furthermore this proof to be adduced by the trustee to overthrow an alleged preference must go to the extent of showing that the creditor had reasonable cause to believe **that the debtor was in fact insolvent.**

“Reasonable cause for belief that a preference  
“was intended to be given necessarily involves  
“reasonable cause for the belief that the debtor  
“was in fact insolvent.”

1 Remington on Bankruptcy, §1402.

“Merely to establish grounds which reasonably would have caused the creditor to believe  
“the debtor insolvent is not enough.”

Idem, §1403.

“Reasonable cause to believe a preference was  
“intended involves reasonable cause to believe  
“the creditor knew insolvency existed as a matter of fact.”

Idem, §1404.

The creditor must have had actual knowledge of the bankrupt's insolvent condition or the circumstances of the case must have been such as to put him upon inquiry and thereby render him chargeable with such knowledge.

In re Houghton Web Co., 26 Am. Bank Rep., 202.

A creditor must have reasonable cause to believe that his debtor is insolvent in fact as a foundation for reasonable cause to believe that an unlawful preference in favor of such creditor was intended.

Wright v. Cotten, 52 S. E., 141.

And it is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency.

Off v. Hakes, 142 Fed., 364.

A creditor "could have no reasonable cause to believe that a preference was intended unless he "knew or suspected the insolvency of the "debtor."

Hergberg v. Riddle, 54 So. (Ala.) 635,  
637, per Mayfield, J.

"To constitute a voidable preference as defined "by §§60a-60b, the creditor must have reasonable "cause to believe the debtor to be insolvent in "fact as a foundation for reasonable cause to be- "lieve that an unlawful preference is intended."

In re Eggert, 3 Am. Bank Rep. 541; S. C.  
98 Fed. 843, per Brown, D. J., aff'd 4  
Am. Bank Rep. 449, S. C. 102 Fed. 735.

The same rule was affirmed in *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 12 Am. Bank Rep. 781, s. c. 123 Ia. 432, where a mortgage was attacked as being a preference.

Bishop, J., in delivering the opinion in this case said: (pp. 785-786)

“Essential to such a preference is insolvency  
“because if the debtor was solvent, the execution  
“of the mortgage would not in all likelihood  
“operate to defeat the other creditors of the  
“mortgagor; knowledge or a reasonable cause to  
“believe that a preference is intended involves  
“therefore knowledge or a reasonable cause to  
“believe that insolvency exists as a matter of  
“fact.”

From the foregoing authorities it follows that the burden of proof is on the trustee and that the proof introduced by him must go to the extent of proving that the creditor had reasonable cause to believe that insolvency existed as a matter of fact. When these rules are applied to the case under consideration, no other conclusion can be reached than that the trustee has failed to sustain the burden imposed upon him for there is nothing in the record to sustain the position that the R. H. Herron Company believed or had reason to believe the Cleveland Oil Company was insolvent as a matter of fact.

THE FACT THAT THE CLEVELAND OIL COMPANY WAS SLOW IN ITS PAYMENTS AND THAT ITS CREDIT WAS CUT OFF, EXCEPT FOR EMERGENCY SUPPLIES DOES NOT CHARGE THE R. H. HERRON COMPANY WITH REASONABLE CAUSE TO BELIEVE A PREFERENCE WAS INTENDED.

The Referee below held that the R. H. Herron Company had reasonable cause to believe a preference was intended. This finding, it is respectfully submitted was error.

It was attempted to be shown that the credit of the Cleveland Oil Company was cut off on the last of August, 1910, (Tr. p. 73, lines 16 and 17.) This fact was not proven by the Trustee for it appears the company was privileged to call at the Bakersfield store of the R. H. Herron Company and buy supplies for emergency requirements; if it wanted anything in excess of the emergency requirements, it was to communicate with the Los Angeles office of the company.

(Transcript, p. 73, lines 22-27.)

Under any circumstances the mere facts that the Cleveland Oil Company was slow in its payments, that it was unable to pay its debts promptly and that in consequence its credit was curtailed, or even cut off, would not charge the creditor with having reasonable cause to believe a preference was intended.

“Neither the mere non-payment of the particular creditor’s claim nor the fact that most of



“the indebtedness to the creditor is past due at  
“the time of the payment on account and that  
“the creditor has been urging payment and the  
“debtor repeatedly promising it, is in itself suf-  
“ficient cause for drawing the inference.”

1 Remington on Bankruptcy, §1409.

This doctrine has been frequently applied.

Thus in *In re Goodhile*, 12 Am. Bank Rep. 374, it was held that the fact that most of the bankrupt's indebtedness to a creditor was past due at the time of a payment on account within the four month's period was not sufficient to charge the creditor with reasonable cause to believe that the bankrupt was insolvent within the meaning of the bankrupt act and that a preference was intended so as to bar proof of the creditor's claim because such payment had not been surrendered.

It appeared here that the creditor was urging payment and that the debtor was promising to pay as fast as she could. There were no other facts from which it could be inferred that the debtor was in an insolvent condition or intended a preference. It was held that the referee erred in rejecting the claim.

“A creditor may suspect his debtor of in-  
“solvent circumstances, but he may not have suf-  
“ficient evidence thereof so as to justify him in  
“refusing to receive payment of his debt in peril  
“of violating the bankruptcy law. The cases hold  
“that he may be even unwilling to trust him  
“further. He may become anxious about his

“claim and desire security for it. Additional  
“security and receiving payments under such  
“circumstances are not prohibited by law.”

Harder v. Clark, 66 Misc. (N. Y.) 584,  
585, per McAvoy, J.

The fact that a creditor demands and receives from his debtor security for a previously unsecured debt at a time when the debtor was actually insolvent does not create an inference that the creditor knew of such insolvency or had reasonable grounds for believing that the transfer was made with intent to create a preference.

Perry v. Booth, 80 N. Y. App. Div. 373.

In the case under consideration there was no fact to show that the Cleveland Oil Company was insolvent, except the fact that it was not able to pay its debts. Therefore the language of Jenkins, J., in *In re Eggert*, 102 Fed. 735, is directly applicable. In this case in discussing a similar question the learned Judge said: (p. 742)

“The only fact brought home to the creditor  
“and which it is claimed should have aroused in-  
“quiry is that he was somewhat behind in the  
“prompt payment of his obligation. We cannot  
“say, as a conclusion of law, that knowledge of  
“that fact standing alone was sufficient to put the  
“creditor upon inquiry. Indeed, it may be said  
“that a majority of merchants absolutely solvent  
“in the sense in which the term is employed in  
“the bankruptcy act, are not at all times able to  
“meet the obligations as they mature. To hold

“that a creditor receiving payment of or security  
“for a debt past due is, by the mere fact of knowl-  
“edge that the debt is past maturity put upon  
“inquiry of his debtor’s inability to pay all his  
“debts and that under such circumstances he re-  
“ceived payment or security at his peril, would  
“be to put at hazard many business transactions  
“and make the act oppressive. The fact of such  
“inability, coupled with other facts and circum-  
“stances brought home to the creditor might put  
“him on inquiry; but this is the only fact from  
“which the deduction is sought that the creditor  
“had reasonable cause to believe his debtor in-  
“solvent, and standing alone, it is insufficient to  
“raise an inference of law that the creditor is  
“chargeable with knowledge of the facts which  
“inquiry would have elicited.”

As has been noticed there is not a shred of testimony in the record to show the creditor’s knowledge of the state of affairs other than the single fact the debtor was behind in its payments. This language then applies with full force and clearly shows that no reasonable cause was proven.

In the case of *In re Ebert*, 2 Am. Bank Rep. 340, it appeared that a creditor could not obtain his money and hired an attorney to collect it. The debtor gave security. The debtor firm was shaky but the partners thought it could pull through. There was nothing to impeach the good faith of the creditor and he did not know of the shaky

condition of the firm. It was held that there was no preference.

That a creditor's knowledge of the debtor's inability to meet his obligation does not show reasonable cause has found frequent illustration in the authorities.

Thus the mere fact that an involuntary bankrupt within the four month's period deposited with a creditor certain book accounts to secure his obligation is not sufficient to show that the creditor had reasonable cause to believe that the securing of its claim was intended as a preference.

Laundry v. First Nat. Bank, 11 Am. Bank Rep. 223.

And a loan to a bankrupt to extricate himself may be made without violating the provisions of the bankrupt law.

Darby v. Boatmans Sav. Ins, 1 Dillon, 142. s. c. on appeal 18 Wallace, 375.

The same rule was laid down in Casey v. La Soirete, etc., Co., 2 Woods 77 and in In re Kullberg, 23 Am. Bank Rep. 758, s. c. 176 Fed. 585.

In Smith v. Hewlett Robin Co., 24 Am. Bank Rep. 153, where an offer of compromise was made, it was held that creditors were justified in believing that it was made in good faith to all the creditors and unless something occurred to put them on inquiry, in the absence of which it was not their duty to investigate to ascertain if the debtor could pay the amount offered and intended

to pay it to all the creditors alike. In this case the Trustee in bankruptcy sought to recover the sum paid to the defendant as a preference. In holding the action would not lie, the Court said, (p. 154)

“The onerous duty of creditors which it is asserted by the appellant (the Trustee) to investigate when an offer of compromise is made to ascertain if the debtor can pay the amount offered and intends to pay it to all creditors alike, places too heavy a burden upon the creditors. When an offer of compromise is made the creditors are justified in believing that it is made in good faith to all creditors unless something occurs to put them upon inquiry.”

The most that can be said of the failure of a debtor to meet his obligations promptly is that it might raise a suspicion in the creditor's mind as to the debtor's financial standing. But even were this true this would not be sufficient to constitute reasonable cause. It is elementary that a mere suspicion on the creditor's part does not constitute reasonable cause.

“Merely because some cause to suspect insolvency of the debtor exists is not enough; there must be such a knowledge of facts as would induce a reasonable belief in the ordinary man that the debtor was intending to give a preference.”

1 Remington on Bankruptcy, §1407.

Or as was said by Trieber, J., in Sparks v.



Marsh, 24 Am. Bank Rep. 280, 285, s. c. 177 Fed. 739:

“The well settled rule of law is that mere  
“grounds of suspicion that a debtor is insolvent  
“or that a payment made by him is intended to  
“create a preference are insufficient to establish  
“the fact that a creditor who received it has rea-  
“sonable cause to believe that a preference was  
“intended thereby. There must be substantial  
“evidence of reasonable grounds for such belief.”

In discussing this subject, Harrison, J., in  
Powell v. Gate City Bank, 24 Am. Bank Rep. 316,  
326, s. c. 178 Fed. 609, said:

“Suspicion, fear and facts which arouse sus-  
“picion and fear that the debtor is insolvent and  
“intends to prefer a creditor, in the absence of  
“knowledge or notice of facts that give such a  
“creditor reasonable cause to believe the in-  
“solveny of the intended preference are insuf-  
“ficient to avoid the latter.”

In Tumlin v. Bryan, 165 Fed. 166, an action  
was brought by a Trustee in Bankruptcy of a  
partnership to recover payments made to a credi-  
tor as a preference. The District Judge rendered  
a decree in favor of the Trustee. On appeal it  
was held that the evidence was insufficient to sus-  
tain the decree and it was reversed. In delivering  
the opinion of the Circuit Court of Appeals,  
Shelby, C. J., said (pp. 168 and 169)

“A careful reading of the evidence does not  
“lead us to the conclusion that the defendant be-

“lieved the firm to be insolvent. But a belief  
“that a debtor is insolvent is a very different  
“thing from the belief referred to by the statute  
“—‘reasonable cause to believe that it was in-  
“tended’ by the payments to give a preference.  
“It may often happen that one, though in fact  
“insolvent, will continue his business and make  
“payments in the usual way, without a thought  
“of preferring one creditor to another, and with  
“the hope and belief that he would finally be  
“able to pay all. If these payments were made  
“by the firm, without the thought of injuring  
“other creditors, and in the belief that it would  
“be able to pay them all, the defendant cannot  
“be charged with reasonable cause to believe  
“that a preference was intended. When a debtor  
“pays, and a creditor receives, the amount of a  
“just debt, the natural presumptions are in favor  
“of the good faith of the transaction. To let the  
“mere fact of the bankruptcy of the debtor with-  
“in four months make the transaction involved  
“voidable would be to create uncertainty and un-  
“easiness as to the probable result of every settle-  
“ment between debtor and creditor. Reasonable  
“cause to believe that a preference was intended  
“cannot be held to be proved by circumstances  
“that would merely excite suspicion. And cir-  
“cumstances may seem suspicious after the bank-  
“ruptcy occurs that would not appear unusual at  
“the time of their occurrence, and would then  
“have presented no ‘reasonable cause’ on which

“to found a belief of intended preference. Merchants and other business men constantly continue to make payments up to the very eve of failure, and it would be disastrous to have them set aside on slight proof or mere suspicion.”

These rules are firmly sustained by the authorities.

Ridge Ave. Bk. v. Sundheim, 16 Am.

Bank Rep. 863, s. c. 145 Fed. 198.

Powell v. Gate City Bank, 178 Fed. 610.

Reber v. Shulman, 179 Fed. 574, aff'd  
183 Fed. 564.

Grinstead v. Union Savs. & T. Co., 190  
Fed. 546, 568.

Johnston v. Geo. D. Witt Shoe Co., 50 S.  
E. 153.

The leading case on the subject is the case of Grant v. National Bk, 97 U. S. 80. This case, it is true, was decided under the former law. It has, however, been cited, approved and followed in innumerable decisions under the present law and may easily be regarded as the foremost authority on the subject of what constitutes reasonable cause. In this case an action was brought by an assignee in bankruptcy to set aside a mortgage or deed of trust as a preference. It appeared that one Miller, the bankrupt, was indebted to the First National Bank of Monmouth, Ill., in the sum of \$6,200.00, of which \$4,000.00 consisted of a note which had been twice renewed and the balance was the amount which he had overdrawn

his account in the bank. Wanting some cash for immediate purpose, the bank advanced him \$300.00 more on his giving them the deed of trust in question, which was made for \$6,500.00 and was given to secure the indebtedness referred to. The question below was whether at the time of taking this security the officers of the bank had reasonable cause to believe that Miller was insolvent. The Circuit Court came to the conclusion that they had not and dismissed the bill. The Supreme Court on appeal affirmed the decree. Because of the importance of this case and also because of its strong application to the case under consideration, it is quoted at length. Bradley, J., in delivering the opinion said, (pp.81-83)

“It is not enough that a creditor has some  
“cause to suspect the insolvency of his debtor;  
“but he must have such a knowledge of facts as  
“to induce a reasonable belief of his debtor’s in-  
“solveny, in order to invalidate a security taken  
“for his debt. To make mere suspicion a ground  
“of nullity in such a case would render the busi-  
“ness transactions of the community altogether  
“to insecure. It was never the intention of  
“framers of the Act to establish any such rule. A  
“man may have many grounds of suspicion that  
“his debtor is in failing circumstances, and yet  
“have no cause for a well grounded belief of the  
“fact. He may be unwilling to trust him further;  
“he may feel anxious about his claim, and have  
“a strong desire to secure it and yet such belief

“as the act requires may be wanting. Obtain-  
“ing additional security, or receiving payment  
“of a debt, under such circumstances is not pro-  
“hibited by the law. Receiving payment is put  
“in the same category in the section referred to,  
“as receiving security. Hundreds of men con-  
“stantly continue to make payments up to the  
“very eve of their failure, which it would be very  
“unjust and very disastrous to set aside. And  
“yet this could be done in a large proportion of  
“cases if mere grounds of suspicion of their  
“solvency were sufficient for the purpose.

“The debtor is often buoyed up by the hope of  
“being able to get through with his difficulties  
“long after his case is in fact desperate; and his  
“creditors, if they know anything of his em-  
“barrassment, either participate in the same  
“feeling, or at least are willing to think that  
“there is a possibility of his succeeding. To  
“overhaul and set aside all his transactions with  
“his creditors, made under such circumstances,  
“because there may exist some grounds of sus-  
“picion of his inability to carry himself through,  
“would make the bankrupt law an engine of op-  
“pression and injustice. It would, in fact, have  
“the effect of producing bankruptcy in many  
“cases where it might otherwise be avoided.

“Hence the Act, very wisely, as we think, in-  
“stead of making a payment or a security void  
“for a mere suspicion of the debtor’s insolvency,  
“requires, for that purpose, that his creditor



“should have some reasonable cause to believe  
“him insolvent. He must have a knowledge of  
“some fact or facts calculated to produce such a  
“belief in the mind of an ordinarily intelligent  
“man.

“It is on this distinction that the present case  
“turns. It cannot be denied that the officers of  
“the bank had become distrustful of Miller’s  
“ability to bring his affairs to a successful termi-  
“nation; and yet it is equally apparent, inde-  
“pendent of their sworn statements on the sub-  
“ject, that they supposed there was a possibility  
“of his doing so. After obtaining the security in  
“question, they still allowed him to check upon  
“them for considerable amounts in advance of  
“his deposits. They were alarmed; but they  
“were not without hope. They felt it necessary  
“to exact security for what he owed them, but  
“they still granted him temporary accommoda-  
“tions. Had they actually supposed him to be  
“insolvent, would they have done this?

“The circumstances calculated to excite their  
“suspicions are very ably and ingeniously  
“summed up in the brief of the appellant’s coun-  
“sel; but we see nothing adduced therein which  
“is sufficient to establish anything more than  
“cause for suspicion. That Miller borrowed  
“money; that he had to renew his note; that he  
“overdrew his account; that he was addicted to  
“some incorrect habits; that he was somewhat  
“reckless in his manner of doing business; that

“he seemed pressed for money,—were all facts  
“well enough calculated to make the officers of  
“the bank cautious and distrustful; but it is not  
“shown that any facts had come to their knowl-  
“edge which were sufficient to lay any other  
“ground than that of mere suspicion. Miller had  
“for years been largely engaged in purchasing,  
“fattening and selling cattle. He had always  
“borrowed money largely to enable him to make  
“his purchases; for this purpose he had long been  
“in the habit of temporarily overdrawing his ac-  
“count; the note which he renewed was not a  
“regular business note, given in ordinary course,  
“but was made to effect a loan from the bank ap-  
“parently of a more permanent character than  
“are ordinary discounts; and his manner of doing  
“business was the same as it had always been.  
“That he was actually insolvent when the trust  
“deed was executed, there is little doubt but he  
“was largely indebted in Galesburg, in a different  
“county from that in which Monmouth is  
“situated; and there is no evidence that the of-  
“ficers of the bank had any knowledge of this in-  
“debtedness.

“Without going into the evidence in detail, it  
“seems to us that it only established the fact that  
“the officers of the bank had reason to be sus-  
“picious of the bankrupt’s insolvency, when  
“their security was obtained; but that it falls  
“short of establishing that they had reasonable  
“cause to believe that he was insolvent.”

The reasoning of this case applies directly here. To be sure this decision was under the former bankruptcy act. But as has been pointed out it has become the rule of decision as to what constitutes reasonable cause under the Act of 1898. Furthermore, the principles of construction laid down by the Courts in determining the force and effect to be given to the phrase "reasonable cause to believe" found in the former Act relating to preferences are equally applicable in considering the meaning of this phrase in the Act of 1898.

Stevenson v. Milliken-Tomlinson, 13

Am. Bank Rep. 201, s. c. 99 Me. 320.

The facts in this case fail utterly to show any grounds for charging the R. H. Herron Company with reasonable cause to believe a preference was intended by the payment and transfers attacked herein. There is only one circumstance disclosed by the record in any way tending to lead to that conclusion and that is that the Cleveland Oil Company was slow in its payments. This, however, as has been abundantly shown, is not enough to charge the creditor with knowledge of insolvency or having reasonable ground to believe a preference was intended. The record being destitute of any other evidence, the case of *Grant v. National Bank* applies with full force and it follows that the ruling of the referee that a preference existed is erroneous and must be reversed.

Particular consideration will now be given to the evidence for the purpose of substantiating this assertion.

THE EVIDENCE IN THIS CASE FAILS TO SHOW THAT THE R. H. HERRON COMPANY HAD REASONABLE CAUSE TO BELIEVE A PREFERENCE WAS INTENDED.

The Referee below reviewed the testimony at considerable length for the purpose of showing that the claimant here had reasonable cause to believe a preference was intended. With the greatest respect for the learned Referee, it is respectfully submitted that his conclusions are not supported by the record.

In the course of his opinion the Referee said: (Tr. p. 12)

“The bankrupt at the time of these payments  
“and transfers of its property not only knew that  
“it was insolvent, but it knew that it was so irre-  
“trievably so that it could not hope to continue  
“its business without some sort of reorganization  
“and its officers knew it could not make the pay-  
“ment which it did without disparity in its pay-  
“ments to its other creditors.”

The evidence produced does not support this statement. There is nothing to show that at the time of the transactions attacked the bankrupt knew it was irretrievably insolvent. The only officer of the company who testified except Mr. Batchelder was Mr. Edson France. He was asked the question:

“Well, at the time you were having these conversations with Mr. Sands, the company was in “pretty bad shape financially, was it not?” (Tr. p. 37)

To this he answered, (Tr. p. 38) “I would not “consider it in very bad shape.”

As he was the only officer who testified, except Mr. Batchelder who apparently had no knowledge on the subject at all, and as he said he did not consider the company in very bad shape, it is apparent that the statement as to knowledge of the officers is without support in the evidence.

The Referee refers to the fact that the claimant cut off the credit of the bankrupt. As will be shown by the authorities cited later, this fact does not show reasonable cause to believe a preference was intended. And taking this fact in connection with the record, there is not a line to show that the credit was curtailed because of a belief in the company's insolvency. Mr. Sands testifying as to this says, (Tr. p. 70)

“We considered at that time they were owing “us quite a considerable sum and of course like “other creditors, they reached the period where “they should either increase or decrease. At that “time we thought we had given them—that they “were up to limit of their credit.”

Asked further, “Isn't it a fact that you practically cut off their credit on the last of “August?” (Tr. p. 70) he said: (p. 70)

“It was not. They were privileged to call at



“our stores at Bakersfield, Taft and Maricopa  
“and buy supplies for emergency requirements  
“and if they wanted anything in excess of the  
“emergency requirement, they were to communi-  
“cate with the Los Angeles office.”

Although a letter had been written as pointed out by the Referee limiting local purchases to \$100, yet thousands of dollars worth of goods had been delivered after that. The claimant sold them in July something over \$3,500.00 worth and in August \$3,000.00 worth. The Referee seems to infer that the sales in August were because of a cash payment. (Tr. p. 14) The sales, however, amounted to \$3,000.00 while the payment was only \$1,500.00.

From the opinion of the Referee, it would seem as if the curtailing of the credit of the Cleveland Oil Company was something new in the dealings of the parties. The record shows, however, that this was customary in its dealings with this as well as other companies.

Sands testifies that early in the commencement of the business—on May 10th, 1909—he notified his manager at Bakersfield not to deliver over \$100 worth on their own responsibility. (Tr. p. 113) Again on January 11, 1910, he limited their credit to \$1,500.00. In relation to this he writes, (Tr. p. 130)

“They are owing us considerable money and  
“they have not acquired the habit of discounting  
“their bills which is our reason for their limited  
“credit.”

On January 21, 1910, he limited deliveries to \$1,000.00 for all three stores, feeling that was enough in view of the amount owed. (Tr. p. 132)

These acts bear out the testimony of Sands who said that the curtailing of credit was not due to the fact that he considered the company bankrupt or insolvent but was simply a business precaution and in accordance with their usual custom. (Tr. p. 113)

Sands testified that the average credit given to all oil companies was below \$1,500.00. (Tr. p. 112) The indebtedness of the Cleveland Oil Company had arisen very much in excess of this and this was the reason for their precaution. At the time of the curtailing of their credit referred to by the Referee, he (Sands) regarded the company as prosperous as at any time in its existence and he considered it a prosperous oil company. (Tr. p. 73.)

This is substantially the testimony in relation to the curtailing the credit of the oil company. It shows clearly that none but the ordinary business relations existed between the parties. There was nothing unusual or suspicious about their dealings. The account of the debtor became larger than the creditor cared to carry and so it exercised the ordinary business precautions taken by careful business men under similar circumstances. At the time the creditor considered the debtor in as prosperous a condition as it ever was and there is no evidence or even a suggestion in

the record that the claimant here regarded the debtor as insolvent. And it is submitted that the Referee was not justified in his view that the curtailing of the credit showed reasonable cause on the part of the claimant to believe a preference was intended.

Continuing the Referee said that in the testimony of its manager and in the letters produced by it upon the hearing the claimant had furnished the evidence from which it must be found that when it received the payment made to it and the property returned to it, it was receiving a preference over the other creditors of the bankrupt. He first considers the return of the property to the claimant. Concerning this the Referee says. (p. 17):

“The proposition to return the goods came  
“from Mr. France and Mr. Sands agreed to it,  
“saying if he would take it back to the store, the  
“claimant would give credit on the account. The  
“only reason that was given for Mr. France offer-  
“ing to return the goods is that he told Mr. Sands  
“that they did not have any cash on hand at the  
“time and that they were willing to return the  
“casing. At that time the company owed a  
“great many other debts but a similar offer was  
“not made to any other creditors.”

In this statement there is the insinuation that the claimant herein was attempting to overreach other creditors with the consent of the oil company. With the greatest respect for the learned

Referee, we say that he has not fully stated the facts and that his conclusions are not justified by the record.

In relation to the return of the property it may be said that the evidence shows that the transaction was in the ordinary course of business and in entire good faith.

It was quite common to take back property from companies and the claimant had done so frequently at a discount of twenty-five per cent from the price of new which was fair between both parties. (Tr. p. 107.) The return of the property here was due to a voluntary suggestion on the part of France, the president of the debtor company. Sands demanded money and there being none, France suggested that the property be returned and credited on the account. (Tr. p. 39.) He stated to Sands that his company had a string of pipe which it had in the field and was not using. (Tr. p. 44.) This was the pipe which was returned.

Sands testified in relation to the transaction that it was quite customary to take back second-hand material. (Tr. p. 85.) That the price at which they took it was more than a fair price. (Idem.) That France had told him that they had no use for the material and would be very glad if it could be received on account as a credit. (Tr. p. 86.) On the same occasion he told Sands that they had no money but were expecting some. (Tr. p. 86.) Sands further testified that he did not

know at any of the times when the property was returned that the debtor was insolvent and that he had no cause to believe a preference was intended. (Tr. p. 111.)

It thus appears that the transaction was an ordinary one—one such as frequently occurred in the usual course of business. The oil company was short of money. It had property it did not need so it returned it and was credited with it on the usual terms. There is nothing absolutely to show that the transaction was with a view to over-reaching the other creditors or with a knowledge of the debtor's insolvency. It was open and above board and in accordance with the usual custom of the creditor. There is no evidence to show that the claimant herein knew of the existence of any other creditors at the time. It is therefore respectfully urged that there was nothing in it to justify the view taken by the Referee.

As regards the payment of \$2,000.00 on the 15th of September, 1910, France testifies that it was made in the usual course of business. (Tr. p. 45.) The Referee does not seem to question this transaction. But continuing, he says, (Tr. p. 18);

“Prior to this, however, facts had been brought to the knowledge of the claimant that were sufficient to have put a reasonably intelligent man upon inquiry.”

In support of this statement he gives the following facts, (p. 18, Tr.):

“The general manager of the company knew



“as early as February 18, 1909, what were the  
“Cleveland Oil Company’s holdings in the Kern  
“River field. He was advised by one of his dis-  
“trict managers on whose information he relied  
“that they were about to commence operations  
“upon ten acres in section 8-29-28, known as the  
“York Syndicate property, and also upon 17½  
“acres in the same section known as the Vulcan  
“property and they were endeavoring to secure  
“other property. At that time the Vulcan had  
“one producing well and the York Syndicate two  
“wells. Mr. Sands had been by the property at  
“another time in the Kern River field and testi-  
“fies that they had quite a number of wells dug  
“there; that they seemed to be in a very prosper-  
“ous condition and they were all in where there  
“were producing oil wells, and in addition to that  
“at that particular time the company had a lease  
“on what was considered valuable oil land in the  
“Midway next to the Buick Oil Company. De-  
“cember 23, 1909, he knew from Dr. France, the  
“president of the company, that they had eight  
“producing wells and were getting from 8,000 to  
“10,000 barrels of oil perm onth.”

It is respectfully submitted that there is absolutely nothing in these facts except what can be regarded as favorable to the claimant, and yet they are relied upon by the Referee as putting the claimant here upon inquiry.

The Referee then discusses the limiting of the credit of the oil company to \$1,500.00 on January

11, 1910, and to \$1,000.00 on January 21st, 1910. These facts have already been adverted to. They occurred months before the transactions here attacked. The claimant in the meantime sold thousands of dollars worth of goods to the Oil company, thus showing by its own actions in the strongest way possible that it did not regard the Oil company as insolvent. They are significant in favor of the claimant as they show that the curtailing of the credit by the claimant later on was merely in the usual course of business.

The Referee then speaks of the four notes due respectively August 21, September 10, October 24 and November 16, 1910. On one of these notes the sum of \$2,000.00 was paid. This payment was in the usual course of business. On another the sum of \$2,823.37 was credited because of the return of the material that was not needed. The note of August 21 was not paid and the other note was not due at the time of the above transactions. These have been already referred to and considered and a further discussion of them is not necessary. The most serious inference that can be drawn from the fact that the notes were not paid when they were due is that the debtor was short of ready money but this, as will be abundantly shown, is very far from proving that the claimant had reasonable cause to believe the debtor insolvent. The Oil company was disappointed in not receiving money in time. (Tr. p. 22.) This is very ordinary and certainly does not show insolvency.

On August 22, 1910, Mr. Lyon, the secretary of the claimant, wrote to Sands a letter in relation to the shipment of casing to the Oil company. (Tr. pp. 139, 140.) The letter in itself is not of particular importance but on it Sands made the following indorsement in pencil: "Keep after them "at least twice a day. Make them come through." This memorandum apparently appealed to the Referee for commenting on it he says (Supp. Tr. p. 21):

"In common parlance, this, even for a credit "man, was 'going some' and after information "which caused him to give directions to keep "after a debtor at least twice a day and make it "come through, it could be hard to say that he "did not have reasonable notice to put him upon "inquiry."

This conclusion of the Referee, it is respectfully submitted is not justified by the language of the memorandum or anything done by the claimant in pursuance of it.

This was a mere memorandum addressed apparently by Sands to himself. He never communicated any such instructions to anyone. He never himself went after the Oil company twice a day nor did he instruct any one else to do so. He wrote several times afterwards to his manager. He did not tell him to go after the Oil company twice a day. Indeed he said nothing suggestive of any suspicion on his part that the Oil company was insolvent and he never expressed any doubt

of getting his money. On October 18, 1910, he wrote (Tr. p. 37):

“The Cleveland Oil Company owe us considerable money and they are not in a position to supply the ready cash. Their stock is almost worthless from a stock market view, the last sales being passed at  $2\frac{3}{4}$  cents. They are endeavoring to arrange the company on a good financial basis but that will take some time,” etc.

Here was no instruction to “keep after them at least twice a day.” In the letter there is no suggestion of doubt as to solvency of the company or that the company would not be able to meet its obligations or arrange its affairs. There is no doubt expressed but that the company would be able to arrange its affairs on a good financial basis. If Sands at the time he wrote questioned the ability of the company to arrange its affairs and felt it was necessary to “go after” them twice a day he would not have said “that will take some time.” He would have used some such expression as “but I do not believe it can do so. Keep after them and make them pay.” To write “that will take some time” is equivalent to saying that the company will be able to arrange its affairs on a sound financial basis. The only question is as to the time it will take; there is none as to the ability to do so. There is no word in the letter to warrant the conclusion that Sands regarded the company as insolvent or

that there was any necessity of going after them twice a day.

The same general conclusions may be drawn as to the letter of August 29 (Supp. Tr. p. 39). In this letter to his district managers Sands says:

“This company has about all the credit we care  
“to extend them; in fact, we don’t care to have it  
“increased over \$50.00 between the various  
“stores.”

Here is a mere curtailing of credit with no suggestion of insolvency, no doubt as to getting their money, no thought of it being necessary to go “after them at least twice a day.”

These letters were both written after the memorandum above referred to. They show that Sands himself did not regard it as of any consequence or of enough importance to give a second thought to it.

Furthermore the very language of the memorandum is itself refutation of the inference placed upon it by the learned Referee. It reads “Keep  
“after them twice a day. **Make them come  
“through.**” The only conclusion that can be drawn from this language is that the Oil company could come through if they kept after it; that it had money and could pay its debts if required to do so. There is furthermore nothing in the memorandum to justify the position that it was necessary to go after them for fear the company was insolvent or for the purpose of overreaching the other creditors. There is no thought



in the memorandum that it was obligatory to go after them for fear there was not enough for all the creditors. It was apparently made without any serious thought, followed up with no word, deed or act and loses all meaning in view of the acts of Sands himself.

The learned Referee also says that the letters produced by the claimant showed that it had reasonable cause. (Tr. p. 18).

These letters are contained in the Transcript beginning with page 123 and in the Supplemental Transcript, pages 38-39. Some of them are referred to in the opinion of the Referee. To quote them would greatly protract the length of this brief. Concerning these letters, it may be said generally that there is not a line, word or syllable to show that the claimant ever suspected the insolvency of the Oil company or that its conduct at any time was with a view to over-reaching creditors or to secure a preference for itself. They all show the utmost good faith on the part of the claimant and they also show that it always had the greatest faith in the solvency of the Oil company.

The Trustee produced four witnesses: Batchelder, the secretary of the Oil company; Edson France, the president; W. C. Mushet, an expert, and John M. Sands, the treasurer of the claimant. Batchelder, the secretary, did not seem to be well informed about matters so his testimony may be disregarded. The testimony of the other three

witnesses is, however, significant.

It is respectfully submitted that the testimony adduced by the Trustee herein fails to show that the appellant here had any reasonable cause to believe a preference was intended in the transactions here attacked. On the contrary, it shows the entire good faith of the appellant all through its dealings with the Cleveland Oil Company. This point will be made clear and the position of the appellant shown to be correct by a reference to the record itself.

Edson France was the president of the company. He was called as a witness by the Trustee and among other questions was asked if the company were not in pretty bad shape financially. To this he answered that he did not consider it to be so. (Tr. p. 38).

He further states that Sands—the representative of the appellant—never intimated that he knew the condition of the Cleveland Oil Company and never threatened to sue it. (Tr. p. 40). He told Sands when the latter demanded money that there was no money in the treasury and that was the reason they made no payment. (Tr. p. 41). But he said that they had oil in storage and that when they sold that and received the money they would make a payment. (Tr. p. 42). He further testified that the payment of \$2,000.00 was made on the indebtedness of the company in the ordinary course of business. (Tr. p. 45).

Mushet, the expert accountant, appointed by a

committee of the stockholders to make an investigation of the books, made a report November 21, 1910. The report showed a liability to bondholders of \$57,000.00 or \$58,000.00. The bonded indebtedness was about \$87,000.00. (Tr. p. 54). The book figures showed assets as follows: "Cash on hand, \$129.26. \* \* \* Oil properties and "leases. \$253,163.05. \* \* \* Devolpment in dif- "ferent companies, \$172,852.36; the France-Mid- "way cook house, \$1,521.51; office furniture and "fixtures, \$770.92." (Tr. p. 57). "So that any "person who inspected the books on September "30, 1910, would find these apparent assets set "forth in the books" (Mushet's testimony, p. 57).

Sands, the manager of the R. H. Herron Company, was called as a witness by the Trustee in Bankruptcy.

He testified that he had not read articles in the paper published about the troubles of the Cleveland Oil Company. (Tr. pp. 65, 66). He never knew about Mushet's investigation or report until it became public. (Tr. pp. 66-114). He only knew about the arrest of the officers of the company by reading it in the public print. (Tr. p.68). He never made an investigation of the affairs of the company and it never furnished him a statement. (Tr. p. 68). He did, however, look at their property. His own language in this point is as follows (Tr. p. 72):

"Yes, I went by the property and they had "quite a number of wells dug there. I don't

“recollect how many. They seemed to be in a very prosperous condition, they were all in where there were producing oil wells, and in addition to that, at this particular time, this company had a lease on what was, and is, considered a very valuable piece of oil territory as I understand it in the Midway fields.”

Continuing, he testified that while the company had a personal guaranty from Dr. France, it never went after him nor demanded the money of him. (Tr. pp. 81 and 82). The account was getting large and the bankrupt told Sands that they were expecting money soon. It was not long after that payments were made. There were payments pretty nearly every month. “It was quite an active account.” (Tr. pp. 84 and 85). He had no knowledge that Mushet was making an examination of the books and no knowledge that the stockholders were investigating the accounts. (Tr. pp. 86 and 87). He always thought it a good account and he had no reason to feel otherwise about it. (Tr. p. 87). To use his own language, “I never considered that there was any question or doubt in regard to the account at all.” (Tr. p. 87). He never questioned the account until the trouble with the postal authorities—the bankruptcy proceedings. (Tr. p. 87).

Further testifying he says that the notes which had been guaranteed by the R. H. Herron Company had been returned by the bank unpaid and that the bankrupt stated as a reason for not pay-

ing them that it had been disappointed in not receiving their money in time to protect them. (Tr. pp. 89, 90). It never gave any checks which were not good; it never gave any checks which it paid at a later date; and it never gave any checks with a request to hold them. (Tr. pp. 90 and 91). When asked why he did not make an investigation of the affairs of the Cleveland Oil Company when the notes were not paid, he said:

“These notes if you follow the records here  
“closely, I believe you will find each and every  
“note had a good and substantial payment there-  
“on, and that the account was active, it was not a  
“dead account. They were buying goods right  
“along.” (Tr. p. 93).

Continuing, Sands says that he took no security for the notes as he considered that the company had security in the property and as an additional safeguard it had Dr. France's guaranty. (Tr. p. 94). In this connection he says, (Tr. p. 94):

“Their property in the Kern River field was  
“according to conversations I had with Dr.  
“France, yielding good productions and I have  
“gone over the property that they had at the  
“Midway field and it had more than a prospective  
“valuation. It was adjoining the Buick Oil Com-  
“pany property which is one of the best proper-  
“ties, we understand, in the State. It joined  
“that.”

Sands then testifies that in 1909 he obtained a



guarantee on a note for \$5,055.00 for the reason that an extension had been asked on the note. On December 31st, 1909, a payment of \$3,000.00 had been made on the note. (Tr. p. 96). He states he made no investigation of the affairs of the company when he received, the letter of October 1, 1910, from W. A. France stating that he would be no longer responsible for the debts because there was no necessity. (Tr. p. 97). He never tried to collect from France personally. (Tr. p. 98).

He further says that the circular as to the re-organization of the Cleveland Oil Company was sent out December 20th, 1910, and that he believed that the re-organization would be effected and that he had no reason to think the company was in a state of insolvency up to the time of the adjudication of insolvency February 20th, 1911. (Tr. pp 108, 109). He believed the company was solvent when the payment of \$5,200.00 was made on the 15th day of September, 1910, and did not know it was insolvent. (Tr. pp. 110, 111). Nor did he know it was insolvent when he wrote the letter of October 26th, 1910, in relation to the return of the pipe that the company was insolvent. (Tr. p. 111). Nor did he know that the company was insolvent when the pumps were returned on November 25th, 1910. (Tr. p. 111).

Nor did he have any reasonable cause to believe the company insolvent at the time of the payment of the \$2,000,000 on September 10th,

1910. (Tr. p. 111). He had no reasonable cause to believe a preference was intended at any of these times. (Tr. p. 112). He had no knowledge of the financial condition of the company up to the time that Mushet's report was published. (Tr. p. 112). He first saw Mushet's report December 20th, 1910. (Tr. p. 114).

The foregoing is the testimony of witnesses called by the Trustee. We have reviewed it somewhat at length for the reason that the case depends upon whether the R. H. Herron Company had reasonable cause to believe a preference was intended when the payment of \$2,000.00 and the transfers of property were made to it. The evidence as reviewed here shows that the R. H. Herron Company acted in entire good faith through the entire transaction. There is nothing to show it had reasonable cause to believe a preference was intended. When it is remembered that the law presumes the acts were regular and valid and that the burden of proof is on the Trustee, how far short the evidence falls becomes apparent.

The acts of the creditor bear out the statement that it acted in good faith and without any thought that the company was insolvent or that preferences were intended.

It appeared that the Cleveland Oil Company had been attached by the Associated Oil Company for \$3,000.00. This information reached the R. H. Herron Company October 16th, 1909. (Tr. p. 125). Yet after this as shown by the

records it sold the bankrupt a great many goods. (Tr. p. 113). This certainly would not indicate that the claimant here regarded the Cleveland Oil Company as insolvent.

Again although Sands had written a letter on July 22d, 1910, instructing the local managers not to deliver goods over the sum of \$100.00, yet the claimant sold the company something over \$3,500.00 in July, 1910, and nearly \$3,000.000 in August, 1910. This conduct is entirely inconsistent with any belief in the company's insolvency. On the contrary it shows clearly that the claimant here regarded the company as sound. Creditors do not sell such large amounts to debtors they regard as insolvent.

Again, it is shown by the testimony here that the claimant never attempted to collect from the guarantor (France) the moneys due on the goods sold to the bankrupt. France, it seems had guaranteed the bills up to a certain date, yet although the bankrupt was behind in its payments, the claimant never made any attempt to collect the debts from him. This indicates that the R. H. Herron Company did not believe the Cleveland Oil Company was insolvent and bears out fully the statement of Sands that the account was a good one. Had the creditor here any doubts of the solvency of its debtor, it would have taken the steps usually taken by creditors under such circumstances and proceeded against the guarantor.

That under the circumstances as disclosed by the record here, no preference was created is abundantly supported by the authorities.

In *In re Eggert*, 3 Am. Bank Rep. 541, s. c. 98 Fed. 843, a debtor was behind in his payments to his creditor. The account was adjusted by giving the creditor an order on the City of Milwaukee for moneys to become due the debtor on a contract, the creditor allowing the debtor a discount of ten per cent. The creditor made no inquiries of the debtor to ascertain his solvency but he practiced no fraud or deceit and did not act in collusion with the creditor. It was held that there was no preference.

This case was affirmed on appeal in 4 Am. Bank Rep. 449, s. c. 102 Fed. 735. On appeal, Jenkins, J., after elaborate review of the authorities, said (p. 457);

“The facts established are within narrow compass. They are that Eggert was insolvent; that he had failed to meet his obligations promptly as they matured; that by the rules of the association of which the Rundle-Spence Manufacturing Company was a member, Eggert was not, while such debt remained unprovided for, entitled to purchase goods upon credit, but only for cash; that the assignment of the claim against the city was not given or received by collusion of debtor and creditor. The finding is somewhat wanting. There is a failure to find that Eggert himself was conscious of his in-

“solvency. The aggregate of his assets and his  
“liabilities is not given. The only fact brought  
“home to the creditor and which it is claimed  
“should have aroused inquiry is that he was  
“somewhat behind in the prompt payment of his  
“obligations. We cannot say as a conclusion of  
“law, that knowledge of that fact standing alone  
“was sufficient to put the creditor upon inquiry.  
“Indeed, it may be said that a majority of mer-  
“chants absolutely solvent in the sense in which  
“the term is employed in the Bankrupt Act are  
“not at all times able to promptly meet their ob-  
“ligations as they mature. To hold that a credi-  
“tor receiving payment of or security for a past  
“due debt is, by the mere fact of knowledge that  
“the debt is past maturity, put upon inquiry of  
“his debtor’s inability to pay all his debts, and  
“that under such circumstances he received pay-  
“ment or security at his peril would be to put at  
“hazard many business transactions and make  
“the act oppressive. The fact of such inability  
“coupled with other facts and circumstances  
“brought home to the creditor, might be sufficient  
“to put him on inquiry; but this is the only fact  
“from which the deduction is sought, that the  
“creditor had reasonable cause to believe his  
“debtor insolvent and standing alone it is insuf-  
“ficient to raise an inference of law that the  
“creditor is chargeable with knowledge of the  
“facts which inquiry would have elicited.”

In *In re Soudares Mfg. Co.*, 8 Am. Bank Rep.



45, a manufacturing corporation while a growing concern and actively engaged in its business within four months of its bankruptcy, obtained a present loan of money to pay off existing indebtedness, especially to meet advances made by another and to increase its output. It secured the loan by a chattel mortgage on its plant, the mortgagee relying upon an investigation alone of the title and apparent value of the machinery and fixtures and upon general statements on the part of the president of the corporation, but with no examination of the books of the corporation or other investigation of its financial standing and ability. The District Court held that the mortgagee had reasonable cause to believe a preference was intended. The decree, however, was reversed on appeal, by the Circuit Court of Appeals, the higher Court holding that the facts recited did not show reasonable cause.

In *Hackney v. Raymond Bros. Clarke Co.*, 10 Am. Bank Rep. 213, it was held that an instruction that notice of facts sufficient to lead a man to the conclusion that a debtor "could not meet obligations as they matured in the ordinary course of business" was notice of his insolvency was clearly erroneous.

In this case there was an absolute transfer of an account against the insolvent debtor in good faith to one who afterwards bought the latter's stock of goods and obtained credit for such account on the purchase price. There was no agree-

ment or understanding that such use was to be made thereof or that the purchaser of the account was to be protected by the creditor in any way. It was held there was no preference to the creditor to the extent of the money he received on the claim.

In *Stevenson v. Milliken*, 13 Am. Bank Rep. 201, s. c. 99 Me. 320, in an action by a trustee in bankruptcy to recover payments as preferences the defendants had no knowledge respecting the financial standing of the insolvent firm except that arising inferentially from a failure to make prompt payment of all their obligations. They were told by one of the partners that the firm was entirely solvent and that there was enough on the book accounts to care for all the other creditors. It was held that there was no preference.

In *Turner v. Fisher*, 13 Am. Bank Rep. 243, s. c. 133 Fed. 594, an action was brought to recover a preference by an insolvent to the defendant corporation. The agents of the defendant testified that they did not know of the insolvency of the debtor and that while the account from him was three months overdue, they were not pressing him and did not believe him to be insolvent. No fact was brought to their notice sufficient to excite in their minds as reasonable men a belief of the debtor's insolvency. It was held there was no preference.

In *J. W. Butler Paper Co. v. Goembel*, 16 Am. Bank Rep. 26, s. c. 143 Fed. 295, an attack was

made upon a mortgage given a creditor as a preference. The bankrupt had repeatedly stated to the representative of the creditor that trouble with his wife was the cause of his failure to pay his indebtedness; that he had a large interest in real estate held in her name; that his other indebtedness was not large; that when the real estate was sold, he could "square up with every one." The creditor believed that the embarrassment of the debtor came from the cause stated, that the value of his property exceeded the amount of the debts and did not suspect indebtedness to other parties for considerable amounts. It was held that there was no preference. In delivering the opinion, the Court of Appeals said, (pp. 29 and 30):

"The good faith of these creditors in seeking  
"and accepting security for their account is not  
"impeached by the circumstances thus appearing. Neither the fact that the accounts are past  
"due, nor the fact alone of financial embarrassment under the conditions stated, establishes  
"the statutory ground for setting aside the security so received as an unlawful preference.  
"The bankrupt complains in his testimony that  
"the appellants (the creditors) refused to furnish  
"him supplies upon credit, after the security was  
"given and it is contended that such refusal is  
"evidence of their belief in his insolvency. It  
"appears, however, that they had required cash  
"payments for all supplies purchased during

“several prior months, so that no change of  
“policy is indicated. In any view the circum-  
“stance is of slight weight, as the extension of  
“credit to purchasers is governed by various con-  
“siderations; the solvent owner of property may  
“well be refused credit if known to be slow pay,  
“deceitful, litigious or in litigation.”

In *Suffel v. McCartney Nat. Bank*, 16 Am. Bank Rep. 259, it appeared that one Dickenson's business was selling musical instruments on terms, the business requiring considerable capital. He obtained loans from the bank giving the leases as collateral. In January, 1900, and in January, 1901, he gave statements to the bank showing a sound financial condition. In May, 1901, he gave notes to the bank for \$1,200.00 with his father-in-law as joint maker, telling the cashier he wanted the money to pay off other indebtedness. On January 1, 1902, he gave an inventory of his stock to the bank and a statement of his liabilities as being \$2,000.00 aside from what he owed the bank. This month his entire stock was destroyed by fire and a little later his household goods were destroyed. He had policies on both his stock and his furniture. About this time the cashier of the bank learned he owed other debts of at least two thousand dollars, that some of his small debts were being pressed for payment and that some of his checks were unpaid for want of funds. The cashier inquired of Dickenson whether he intended to resume business and was told that he

had about arranged with his creditors to pay them fifty per cent of the amount due them at once and they would give him time to pay the balance. The bank's claim was secured by notes on which the father-in-law of Dickenson was joint maker and was regarded as perfectly good. Nevertheless the cashier asked Dickenson to take up the notes with the insurance money, but did not insist in such payment. Dickenson, however, offered to make payment. It was held by the lower Court that the payment did not constitute a preference, the Court finding that neither the bank's cashier nor any of its officers believed Dickenson to be insolvent and that none of them had reasonable cause to believe that it was intended by said payment to give a preference. This judgment was affirmed on appeal. In delivering the opinion Cassaday, C. J., said, (p. 201):

“The Court found in effect that the facts  
“known to the cashier, at the time of such pay-  
“ment were such as would naturally produce in  
“the mind of a reasonably intelligent man a  
“doubt or suspicion of Dickenson's solvency, and  
“were such as would put a reasonably prudent  
“man on inquiry, if the bankrupt law required  
“the same diligence of creditors concerning pref-  
“erential payments that is required of grantees  
“in cases of fraudulent conveyances. The ob-  
“vious meaning of this language when construed  
“in connection with the other findings mentioned  
“is that the Court held as a matter of law that



“the present Bankrupt Act does not require the  
“same diligence of creditors concerning prefer-  
“tial payments that is required of grantees in  
“cases of fraudulent conveyances; and hence the  
“facts known to the cashier at the time of receiv-  
“ing the payment, though sufficient to produce in  
“his mind a doubt or suspicion of Dickenson’s  
“solvency, yet they were insufficient to prove that  
“the cashier had at the time reasonable cause to  
“believe that Dickenson was then insolvent or  
“that in making such payment he intended to  
“give a preference to the defendant. This is in  
“harmony with the conclusion of the lengthy  
“opinion of the trial judge when he said in effect,  
“that the point to be decided was somewhat dif-  
“ficult but a considerable reflection had led him  
“to the conclusion that the knowledge of facts  
“and circumstances possessed by the cashier  
“were well calculated to produce a doubt or raise  
“a suspicion in the mind of an ordinary intelli-  
“gent man as to Dickenson’s solvency, but not  
“such as was calculated to produce a belief of it;  
“and as that was essential to the plaintiff’s  
“cause of action, he could not recover. Such find-  
“ings of fact seem to be sustained by the evi-  
“dence.”

The Court then asks. “Are the conclusions of  
“the trial court in accordance with the law ap-  
“plicable to the case?” After a review of the  
authorities, the Court says, “We find no error”  
and affirmed the judgment.

In *Matter of Alden*, 16 Am. Bank Rep. 362, it was held that mere taking of security within the four month's period was not enough to charge the creditor with taking a preference. In this case Doyle, Referee, said (p. 379):

“Every person who receives security for a debt has knowledge that he is being preferred to the extent of being secured, but Sections 60a and 60b require more knowledge than that. He must know that the bankrupt is insolvent and that by getting this security he will be enabled to obtain a greater percentage of his debt than any other creditor of the same class. Such knowledge cannot be had unless he knows that that the debtor is insolvent; that he has not property enough to pay his general creditors; and that by this security so given, he, the privileged creditor, is being taken out of the class of general creditors to be paid in full at their expense.”

In *Tomlinson v. Bank of Lexington*, 16 Am. Bank Rep. 632, there was a mutual running account between a bank and one of its customers who for several years had been allowed to overdraw to meet current expenses upon the distinct understanding and agreement that the next succeeding deposit should be applied to existing overdrafts. It was held that deposits so made did not constitute preferences which must be surrendered before the bank could prove a claim upon the bankrupt's notes held by it even though

the deposits were made within the four month's period.

In this case Purnell, J., in delivering the opinion of the Court said, (p. 637):

“The bankrupt in the case at bar was struggling for existence—it was in financial straits, “had made propositions of composition or settlement with its creditors and the bank in a legitimate way was extending a helping hand, agreed “on a basis for extending credit, allowing overdrafts. There was a large amount, \$13,100.00, “due on notes endorsed by officers of the bank, “which, if the manufacturing company could succeed, the bank would realize from the assets of “the bankrupt; if not the debt would be lost or “at least much reduced. If such assistance on “the part of banking institutions are to be condemned, held to be preferences in case of bankruptcy many of the manufacturing and other “institutions would suffer, especially in their “early days of struggle, before they had attained “a standing on a foundation strong enough to enable them to resist the financial storm arising “from an inability to sell their product or realize “on accounts, bills of lading or other current “assets. In short it would close them to all avenues of commerce and compel them to do a C. O. D. business on a very small scale, virtually “putting them out of business as soon as it is “proved they cannot meet their liability, are insolvent as defined in the bankrupt act. Con-

“gress did not intend nor did it in fact ever enact  
“a law to effect this purpose.”

In *Hussey v. Richardson & Co.*, 17 Am. Bank Rep. 511, s. c. 148 Fed. 598, the facts were substantially as follows: The creditor had but recently been doing business with the bankrupt. It made inquiries usual among jobbers to determine whether he was entitled to credit and sold him about \$2,000.00 worth of dry goods. He was slow in making payments as they matured, but with knowledge of that fact the mortgagee kept on selling him goods. Learning that the bankrupt had mortgaged his stock for \$1,000.00, the creditor sent an attorney to the town where he was doing business to inquire. He learned the bankrupt had borrowed the \$1,000.00 to pay a debt then due and was told the mortgage was executed with the approval of a wholesale grocery house which was one of his two remaining merchandise creditors. An investigation into his affairs followed. His stock was estimated by the attorney to be worth \$5,000.00, although regarded by the bankrupt as worth \$8,000.00. The indebtedness was represented as not being over \$3,500.00. The bankrupt advised the attorney he could sell the stock for \$6,000.00 and asked the attorney to stay over until the deal was closed. He told the attorney he was solvent, that his business was good and his assets more than sufficient to pay all his debts, but that he did not have enough capital to pay them promptly. The attorney concluded not

to wait until the sale was consummated, but before returning took a chattel mortgage to secure the debt. On an attack upon this mortgage as constituting a preference, it was held that the transaction was valid and not within the prohibition of the Bankruptcy Act.

Where a debtor, although in fact insolvent and while continuing to do his business in the usual way may make a payment to a creditor without a thought of the disparagement of the other creditors and with confidence in his ability to pay them all, the creditor receiving such payment in the belief that the debtor while paying him the debt in the common course of business, is acting without any purpose of giving him special favor, cannot be held to have had reasonable cause to believe that a preference was intended.

In re First Nat. Bank, 18 Am. Bank Rep.

766.

In *Getts v. Jonesville, etc., Co.*, 21 Am. Bank Rep. 5, the facts showed that the creditor was undoubtedly suspicious and anxious to secure its claim. It knew that goods stated to be worth \$4,000.00 in November, 1906, had been settled for by the insurers for \$700.00 in April, 1907. It knew that the debtor's checks had been protested and that he was out of business and hard up. It *was* informed that there was some danger of the debtor's insolvency, although he was at that time a wage earner and apparently could not be made an involuntary bankrupt. On the other hand, it



relied on the debtor's property statement and trusted him within a month before receiving the payment by taking his signature as surety on a note for more than \$600.00 and in reliance thereon delivered goods worth some \$400.00. It was held that the facts failed to show a preference.

In *Irish v. Citizens Trust Co.*, 21 Am. Bank Rep. 39, s. c. 163 Fed. 880, a bank received payment of notes from an insolvent corporation. It had demanded payment of the notes before. There was no doubt of the insolvency of the corporation at the time of the payment, but it did not appear that the insolvent intended a preference, as it hoped to be able to go on in business, and it did not appear that the bank had ever refused loans. It was held the facts did not constitute a preference.

In *In re Wolf Co.*, 21 Am. Bank Rep. 73, s. c. 164 Fed 448, affirmed sub nom. *Sharpe v. Allender*, 22 Am. Bank Rep. 431, s. c. 170 Fed. 589, it appeared that within the four month's period, a bankrupt corporation in order to secure its note given for a loan to one who knew that it was in embarrassed circumstances, was pressing payment and threatening to sue, made an absolute assignment to the holder of the note, who in pressing payment was assured by those best calculated to know that the corporation's embarrassment was only temporary and that his debt was safe.

In holding that these facts did not charge the creditor with taking a preference, Archbold, D. J., said (p. 87):

“He (the creditor) may have known that the  
“report was unsatisfactory, as was evident be-  
“cause the re-organization was not carried out as  
“contemplated. But that is far from knowing  
“that it showed the company to be insolvent. Nor  
“did he manifest any more anxiety about his  
“claim than he had before that, as would have  
“been the case if he had such knowledge. The  
“idea that Allender (the creditor) could go to  
“the books is not to be thought of. Nor could he  
“expect to get access to the reports of the ex-  
“perts if it had been asked for. It is not intimate  
“and accessible information such as this, that a  
“creditor is bound by but that which is open to  
“observation and will yield to reasonable in-  
“quiry where it had not been expressly brought  
“home to him. No doubt in the present instance,  
“Allender was anxious over his debt and pressed  
“for its payment and may have expressed ap-  
“prehension with regard to it. But this is not to  
“be carried too far nor made to operate too  
“strongly against him particularly in view of the  
“assurance which he had received from those  
“best calculated to know on which he had a right  
“to rely, to the contrary.”

If payments are made by a bankrupt firm to a creditor within the four month's period, without intent to injure other creditors and in the belief that it would be able to pay them all, the creditor cannot be charged with reasonable cause to believe that a preference was intended.

Tumlin v. Bryan, 21 Am. Bank Rep.  
319, s. c. 165 Fed. 166.

In *In re Neil, etc., Co.*, 22 Am. Bank Rep. 401, s. c. 170 Fed. 481, the creditor was doubtful of the debtor's financial standing and sent his agent to make inquiry. The agent's report was that the debtor was solvent, but was carrying too large a stock. Circumstances occurring to awaken the suspicion of the creditor, he went to where the debtor did business with a view to take legal proceedings and ask for the appointment of a receiver. He was assured by the debtor of his solvency and after consultations between the parties and their counsel, the debtor assigned to the creditor policies of insurance on property that had been destroyed by fire. It was held the assignment did not constitute a preference.

Where in an action by a trustee in bankruptcy in an action to recover chattels transferred by the bankrupt within the four month's period, the proof shows that the creditor received the chattels believing that the bankrupt while paying him his debt in the course of business, was acting without intent to favor him over other creditors, he cannot be held to have had reasonable cause to believe that a preference was intended.

Harder v. Clarke, 25 Am. Bank Rep. 756,  
s. c. 66 N. Y. Misc. 584.

Where a depositor in a bank accepted collateral for his deposit, the bank requesting him not to withdraw his deposit owing to the stringency in

the money market, but informing him that if a crisis came, he would be paid and it had sufficient assets, he is not chargeable with reasonable cause to believe a preference was intended, where he testified that he believed the statement of the bank and he had no thought or information of any kind that the bank was insolvent or anything of that kind.

*Kimmerle v. Farr*, 26 Am. Bank Rep,  
818, s. c. 189 Fed. 295.

It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency.

*Off v. Hakes*, 154 Fed. 364.

In this case at the time of the giving of an alleged preference, the creditors agent was informed that in case of a sale of the bankrupt's goods at their then estimated worth, the bankrupt's ability to pay its creditors in full would depend on its ability to collect its then outstanding amounts of an undisclosed amount. It was held that such information was insufficient of itself to charge the creditor with knowledge that a preference was intended.

A leading case on the question is *Stucky v. Masonic Sav. Bank*, 108 U. S. 74. In this case an action was brought by an assignee in bankruptcy to have mortgages executed by the bankrupt to one Krieger declared void as a preference. In holding they were not preferences, the Court fol-

lowed the case of *Grant v. National Bank*, 97 U. S. 80, and quoted at length in a former part of this brief. Miller, J., in delivering the opinion said (p. 75):

“That case establishes the doctrine that a  
“creditor dealing with a debtor whom he may  
“suspect to be in failing circumstances, but of  
“which he has no sufficient evidence, may receive  
“payment or security without violating the bank-  
“rupt law. He may be unwilling to trust him  
“further; he may feel anxious about his claim and  
“and have a strong desire to secure it, yet such  
“belief as the act requires may be wanting. Ob-  
“taining additional security or receiving pay-  
“ment of a debt under such circumstances is not  
“prohibited by law.

“In the case before us the testimony of Krieger  
“himself as the one who best knows the strength  
“of the suspicion, if any, on which he acted, and  
“what evidence was before him must chiefly  
“control.

“We have examined his deposition very care-  
“fully. We think it bears the impress of candor  
“and it negatives the idea that he had reasonable  
“ground to believe Miller was insolvent, or that  
“he actually did believe it.”

This reasoning applies directly here and would seem to be conclusive of the question under consideration.

Payments on a running account in the usual course of business by a person whose property



had actually become insufficient to pay his debts, where new sales succeeded payments and the net result was to increase his estate, and the seller had no knowledge or notice of the insolvency and no reason to believe an intention to prefer, are not preferences which must be surrendered as a condition to the allowance of proof of his claim.

Jaquith v. Alden, 189 U. S. 78, s. c. 9  
Am. Bank Rep. 73.

A mortgage given on a manufacturing plant is not a preference where the mortgagee was unacquainted with the company and acted through an agent upon representations by the president and a report by the agent, although the company was in fact insolvent and although the mortgagee knew that a large part of the money borrowed was to be used in paying outstanding unsecured debts.

In re Soudan Mfg. Co., 113 Fed. 804.

In In re Oppenheimer, 140 Fed. 51, it was held that the fact that a bankrupt asked a creditor if he would accept merchandise from his store in part payment of his debt, does not charge the creditor, who accepted the offer, with reasonable cause to believe.

“At most,” said Reed, J., in this case (p. 54), “this would only suggest that the bankrupt was “short of ready money and desired to make payments that way as far as he could instead of in “money.”

The fact that a lender before advancing money

in accounts imposed onerous and oppressive terms does not show he had knowledge of the bankrupt's insolvency.

Van Iderstine v. Nat. Disc. Co., 174 Fed.  
518.

In order that a trustee in bankruptcy may recover money paid as an alleged preference, there must be an advantage actually given to such creditor over others with knowledge on the part of such creditor of the intention of the debtor to prefer him and an intent and a guilty collusion on the part of a creditor with the debtor to accomplish this end.

Bacon v. Merchants Bank, 146 Ala. 521.

This case further held that the fact that the notes which the debtor paid bore interest at an usurious rate did not show reasonable cause.

The knowelge of a purchaser of a stock of goods from a partnership that the partners have personal liabilities and that the firm is indebted without knowledge that the partnership debts exceed its assets is not sufficient as a matter of law to charge the purchaser with knowledge of the intention to make a preference.

Lyon v. Clark, 129 Mich, 381.

The fact that one requested security for a loan that had run a number of years does not show reasonable cause.

Congleton v. Schreifhofer, 54 Atl. 144.

Nor does the fact that a bank demanded additional security for a loan.

Rankin v. Third Nat. Bank, 14 Nat.  
Bank. Reg. 4.

Nor does the fact that a debtor is compound-  
ing with his creditors.

Wilson v. Weigle, 62 Atl. 458 (N.J.)

Nor is the fact that a creditor suspected the  
debtor to be in an embarrassed condition and was  
anxious about his debt when he received a partial  
payment.

Burnham v. Ft. Dodge, etc., Co., 123  
N. W. 230.

Nor the fact that he fails to meet his obliga-  
tions promptly.

Arkansas Nat. Bank v. Sparks, 103 S. W.  
626 (Ark.)

Nor the refusal by a bank longer to discount  
the notes of a customer and the taking of a judg-  
ment note.

Keith v. Gettysburg Nat. Bank, 10 Am.  
Bank Rep. 762.

The fact that bankers enter into an agreement  
with a depositor to borrow his deposit, giving  
him security, does not charge the depositor with  
having received a preference.

Harmon v. Feldheim, 91 N. W. 744  
(Mich.)

And generally it may be said that the authori-  
ties fully support the doctrines that reasonable  
cause is not shown by the fact that the creditor  
knows his debtor is in an embarrassed condition  
financially; that the debtor is slow and uncertain

about meeting his obligations; and that the creditor is anxious about his debt; or takes security for it; or is importunate in requiring payment, where there is nothing to show that the creditor has knowledge of facts charging him with notice of the debtor's insolvency—that is, that his assets are not equal to his liabilities.

Curtiss v. Kingman, 20 Am. Bank Rep.  
95, s. c. 159 Fed. 880.

In re Peacock, 24 Am. Bank Rep. 159.

In re Evans Lumber Co., 23 Am. Bank  
Rep. 881, s. c. 176 Fed. 643.

Sparks v. Marsh, 24 Am. Bank Rep.  
280, s. c. 177 Fed. 739.

Powell v. Gate City Bank, 24 Am. Bank  
Rep. 316, s. c. 178 Fed. 609.

Hamilton Nat. Bk. v. Balcomb, 24 Am.  
Bank Rep. 338, s. c. 177 Fed. 155.

In re Houghton Web Co., 26 Am. Bank  
Rep. 202.

In re Varley, etc., Co., 26 Am. Bank Rep.  
840, s. c. 191 Fed. 459.

Chic, etc., Co. v. Roebling Sons Co., 107  
Fed. 71.

In re Pettingill, 135 Fed. 218, s. c. aff'd  
14 Am. Bank Rep. 757.

Debus v. Yates, 193 Fed. 427.

Edwards v. Corondelet Mill Co., 108 Mo.  
App. 275.

Guichtel v. First Nat. Bank, 66 N. J. Eq.  
88.

Stackhouse v. Holden, 66 N. Y. App.

Div. 423.

Sierine v. Stover, etc., Co., 64 S. C. 457.

Stratton v. Lawson, 27 Wash. 310.

Dunlap v. Thomas, 28 Wash. 521.

In re Wright, 2 Nat. Bank Reg, 490.

Johnston v. Witt Shoes Co., 50 S. E. 153.

Coder v. Arts, 152 Fed. 943.

The principle governing in the foregoing authorities applies directly here and leaves no doubt of the soundness of the conclusion that as a matter of law the Trustee here has failed utterly to discharge the burden of proof imposed upon him and that he has failed entirely to show that the R. H. Herron Company was guilty of receiving preferences in the transactions here sought to be set aside. Under the unquestioned rules of law as shown by the citations herin given there must be a clear showing by the Trustee of facts which will charge the creditor with notice so as to bind him with reasonable cause. We have analyzed at some length the testimony and it is respectfully submitted that there is a dearth of any evidence to show that any of the requirements of the law have been complied with by the Trustee, but that on the contrary every act of the creditor here was characterized by entire good faith and was wholly free from even an insinuation of unfairness or over-reaching.

The learned Referee says that notice of facts that would invite a man of ordinary prudence to



inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose. This is an elementary and well settled rule which no one will deny. With the greatest respect for the learned Referee it is submitted, however, that there is no room for the application of this rule here. But while appellant strenuously denies that the facts here were such as to put it on inquiry, if it be supposed for the sake of the argument, they did put the claimant here on inquiry, what would an inquiry here have shown?

The case here must be judged by the record. It cannot be assumed for the purpose of overthrowing this claim that the Oil company was known to be insolvent or that such was its general reputation in the community.

Suppose the claimant had inquired of the president. This, as far as the record goes, would show nothing that was not favorable because the president testified that he did not consider the company in bad shape financially. (Tr. p. 38.)

Suppose the claimant had made an examination of the books of the company. This would not have disclosed that it was insolvent. It seems that the stockholders appointed an expert—one Mushet—to examine the books that they might ascertain the condition of the company's affairs. It may be remarked, in passing, that if the stockholders had to hire an expert to learn the standing and condition of the company, the claimant

could hardly be charged with notice of that standing and condition. But what did the books show, according to the report of the expert? The book figures showed assets and liabilities as follows:

“Cash on hand, \$129.26. \* \* \* Oil properties and leases, \$253,163.05. \* \* \* Development in different companies, \$172,852.55; the France-Midway cook house, \$1,521.51; office furniture and fixtures, \$770.92.” (Tr. p. 57.)

The liabilities, according to the same report, were as follows, (Tr. p. 54):

“The liabilities outside of the liability to stockholders and bondholders was in the neighborhood of \$57,000 or \$58,000. \* \* \* The bond issue was \$100,000 and there seemed to be \$13,000 unissued which would make about \$87,000 issued.”

According to the expert, “Any one who inspected the books on September 30, 1910, would find these apparent assets on the books.” (Tr. p. 57.)

The conclusion is irresistible that an examination of the books would show the company to be solvent.

There is no evidence in the record as to the general reputation of the company in the community, no evidence that it was at all heavily indebted, no evidence that it was being harrassed or pursued by creditors; no evidence that its credit was not good. There is an utter dearth of

testimony in the record to show that if the claimant here had made inquiry, that the inquiry would have led to any knowledge. The Trustee here has failed to produce anything that would charge the claimant with knowledge had it made the inquiry trustee claims it was called upon to make. Therefore, he has not sustained the burden of proof imposed upon him by the law.

The company all this time had very valuable leases. It is true that later these went back. But this appeal is to be determined by what appeared at the time and not by what occurred subsequently. The claimant relied upon these leases as well as upon other things as it was justified in doing.

It is respectfully submitted that even if the claimant here was put on notice and bound to make inquiry—which we insist on the facts of this case was not necessary—nevertheless there is nothing in this record that would disclose to the claimant herein that the Oil company at the times of the transactions here attacked was insolvent, that is that the aggregate of its property at a fair valuation would not be sufficient in amount to pay its debts.

### CONCLUSION

With the greatest respect for the learned Referee, it is suggested that he confused the facts which existed at the time of the transactions involved with facts that happened subsequently. In this an injustice—of course unwittingly—

has been done to the appellant. Subsequent events often prove persons to be insolvent who at the time, were apparently perfectly solvent and amply able to pay their debts. This shows the danger of considering anything arising subsequently in determining the question of reasonable cause.

In this case there was no evidence whatever to the effect that the bankrupt here intended to favor the claimant here as against the other creditors. There is nothing to show that it intended a preference. There is no showing of any collusion or understanding between the parties by which the claimant was to profit at the expense of the other creditors. The Referee was compelled to rely upon a presumption to establish the intent of the debtor. It does not appear that the claimant was aware of any other indebtedness of the bankrupt or that it had other creditors threatening its solvency. There is nothing to show that the claimant believed or had reason to believe the debts exceeded the assets. There is no evidence that the claimant knew it was being paid at the cost of the other creditors. There is no evidence that the claimant knew of the insolvency of the debtor or suspected it. While anxious about its claim it was no more so than it had been all through its dealings with the bankrupt. That it did not suspect bankruptcy is best shown by its own acts for but a short time before the acts attacked here, it had trusted the bankrupt with thousands of dollars worth of goods.

As the relations of the parties had been the same from the beginning, this would certainly show the claimant did not suspect insolvency. All that the evidence proves is that the company was embarrassed for ready money. It had valuable properties worth far more—according to the report of the expert—than all its debts including its bonded indebtedness. It was hopeful and expected to succeed up to the very end, but it had difficulty in meeting its obligations promptly. This is the case of thousands of others who bring their enterprises to successful conclusions. The law encourages those who are struggling to extricate themselves from their financial difficulties. The law looks with leniency on those who deal with them in good faith under such circumstances. It is respectfully submitted that the rule laid down by the Referee is not in keeping with the broad view adopted by the Courts and that the order confirming the report of the Referee should be reversed.

Respectfully submitted,

GEO. E. WHITAKER,

Attorney for Appellant and Claimant.

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**No. 2254**

IN THE

**United States**

# **Circuit Court of Appeals**

**FOR THE NINTH CIRCUIT.**

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**R. H. Herron Company, a corporation,**

*Appellant,*

*vs.*

**William H. Moore, Jr., Trustee in  
Bankruptcy of the Cleveland Oil  
Company, a corporation,**

*Appellee.*

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**Brief of Respondent William H. Moore, Jr., Trustee of  
the Estate of the Cleveland Oil Company, a Corpor-  
ation, Bankrupt.**

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## **STATEMENT.**

The facts of this case have been stated in full in the opinion rendered by the referee in bankruptcy on the 14th day of October, 1912 [Tr. p. 4 to 8, inclusive], and in the brief of appellant on file herein. Respondent therefore deems it unnecessary to recite at length all the facts involved in this case.

The issues involved herein have been thoroughly considered by the referee in bankruptcy and in the United States District Court of the Southern District of California, Judge Wellborn sitting, wherein Judge Wellborn affirmed the decision of the referee. The facts are briefly as follows:

On the 12th day of January, 1911, an involuntary petition in bankruptcy was filed against the Cleveland Oil Company, and thereafter, on the 20th day of February, 1911, the Cleveland Oil Company was duly adjudicated a bankrupt. After said adjudication the appellant, R. H. Herron Company, filed a claim against the bankrupt estate for the sum of \$14,804.32. Thereafter the trustee of said bankrupt estate filed an objection to said claim on the ground that on the 15th day of September, 1910, the bankrupt had paid to R. H. Herron Company the sum of \$2000.00 which constituted a preference, and that on October 31, 1910, the bankrupt returned to the Cleveland Oil Company oil well casings of the value of \$2823.37, and that said payment constituted a preference, and that on the 31st day of December, 1910, the bankrupt returned to the company two pumps of the value of \$300.00, which payment constituted a preference. Said claim and the objection thereto came regularly for hearing before the referee in bankruptcy, and after hearing all the evidence concerning the same, and having considered the issues involved, the referee found that each of said payments constituted a preference, and held that the claim of the company in the sum of \$14,804.32 be not allowed unless it surrender to the trustee said preferences, together with interest thereon from the time of payment.

The claimant filed a petition for review in the United States District Court of the Southern District of California, and on said review the Honorable Olin Wellborn, district judge, after fully considering the evidence and the issues involved, confirmed the findings and decision of the referee.

THE PAYMENTS SET OUT IN THE OBJECTION TO APPELLANT'S CLAIM WERE VOIDABLE PREFERENCES, AND ALL OF THE ELEMENTS NECESSARY TO CONSTITUTE SAID PREFERENCES WERE SUPPORTED BY THE EVIDENCE.

It was necessary for the trustee in this case, in order to support his objections to the proof of debt by the claimant in that said claimant's claim should be disallowed for the reason that it had received certain preferences, to show:

First: That said payments were made within four months preceding the filing of the petition in bankruptcy and that they were made on a pre-existing debt owing to the claimant.

Second: That at the time said payments were made to the claimant said bankrupt was insolvent.

Third: That said bankrupt in making said payments intended to give to the claimant a preference.

Fourth: That the result of said payments was to enable the claimant to obtain a greater percentage of his debt than other creditors of the same class.

Fifth: That at the time said payments were made the claimant had reasonable cause to believe that it was intended thereby to give it a preference.

Evidence was introduced by the trustee supporting each of the above elements of a preference, and the ref-

eree in bankruptcy and the United States District Court on review from the hearing before the referee, found that each of said payments constituted a preference, and that the claim should be disallowed unless said preferences were paid over to the trustee.

At the time the first payment in controversy was made to the claimant, the bankrupt was indebted to the claimant in approximately the sum of \$20,000.00 for goods, wares and merchandise sold to said bankrupt by the claimant, part of which was carried in open account against the bankrupt, and the balance thereof was represented by certain notes executed by the bankrupt in favor of claimant. [Tr. pp. 119-120.]

The payments in controversy were made on the 15th day of September, 1910, the 31st day of October, 1910, and the 31st day of December, 1910, all of which were made within four months preceding the filing of the petition in bankruptcy, which was filed January 12, 1911.

The findings of the referee and the decision of the District Court to the effect that at the time these payments were made the bankrupt was insolvent, is sufficiently supported by the evidence. The schedule in bankruptcy shows that the bankrupt was indebted in secured claims in the sum of \$103,211.02 and in unsecured claims in the sum of \$34,234.61. [Supp. Tr. pp. 10 to 28, inc.]

The property which came to the hands of the trustee in bankruptcy, being property held by the bankrupt at the time of the filing of its petition, did not exceed the sum of \$10,000.00. [Tr. pp. 49-51.]

Mr. Edson France, treasurer and vice-president, testified that between the 12th day of September, 1910, and the 6th day of March, 1911, there was no material changes in the assets or liabilities of the company. [Tr. p. 26.]

Mr. W. J. Batchelder, one of the directors of the bankrupt and secretary of the company, testified that he was familiar with the assets and liabilities of the company, and that there was no particular change in the assets of the company between the 12th day of September and the date of the bankruptcy. [Tr. p. 116.]

Mr. W. P. Mushet, an expert accountant, on the 26th day of October, 1910, made an examination of the books, accounts and the affairs of the corporation, and made a report thereon on the 21st day of November, 1910. The report shows that on September 30, 1910, the bankrupt's liabilities amounted to \$57,529.06 and in addition thereto a bonded indebtedness of \$100,000.00; and that its assets consisted of leases known as the California Kern, France Mid-Way, Vulcan Lease, and York Syndicate, and the office furniture and fixtures, which cost \$770.92. [Tr. pp. 54, 55, 56, 57.]

The leases held by the company were of very doubtful value and were forfeited to the lessors. [Testimony of Wm. H. Moore, trustee, pp. 50, 51, 52, 53.]

It can hardly be contended that these assets out of which the trustee did not realize in excess of \$10,000.00 were at any time during the four months of sufficient value to pay the unsecured indebtedness of the company, amounting to over \$57,000.00.



At the time each of the payments was made, the bankrupt being insolvent, it must be held that the bankrupt intended to give a preference to the claimant. The intent in the absence of other proof may be shown by its equivalent in law. Proof of the inevitable result of the transaction, which in this case was to give a preference and to create an unequal distribution of the bankrupt's estate. At the time the payments were made the bankrupt, by the testimony of its officers, Edson France and W. J. Batchelder, not only knew that it was insolvent, but knew that it was irretrievably so; and that it could not make the payments which it did without disparity in payments to its other creditors.

If the effect was to create a preference and such was its natural consequence, it must have presumed to have intended that which was the necessary result of his act.

*In re Dorr*, 196 Fed. 292;

*Western Timber Co. v. Brown*, 196 U. S. 502,  
at 508, 25 Sup. Ct. 339, 49 L. Ed. 571;

*Remington on Bankruptcy*, Vol. III, page 417.

In view of the large unsecured indebtedness to other creditors existing at the time these payments were made, and in view of the small amount of assets owned by the bankrupt at the time, it is evident that the payments enabled the claimant to obtain a greater percentage of its debts than other creditors of the same class.

The remaining element of preference as to whether or not the claimant at the time of receiving each of said payments had reasonable cause to believe that it was intended thereby to give it a preference, is the only

issue which was vigorously contested by the claimant in this proceeding.

The trustee was at great disadvantage in this case for the reason that the parties interested and the witnesses were very reluctant and unwilling to give the court the information which they possessed.

Mr. Sands for the reason that he was one of the officers of the claimant, and very desirous that his company's claim should be allowed.

Mr. France and Mr. Batchelder for the reason that at the time the testimony was given they were under arrest by the United States postal authorities on account of transactions connected with the Cleveland Oil Company.

Thus the trustee was unable to present to the court a full and complete statement of the transactions surrounding these payments, and the transactions between the claimant and the bankrupt, but the evidence that he succeeded in obtaining and putting before the court was sufficient to convince the court that at the time each of the payments were made claimant, it had reasonable cause to believe that a preference was intended.

The evidence shows that as early as January 11, 1910, the claimant had commenced to be suspicious of the ability of the bankrupt to pay for the goods sold to it, and on that day it notified the Oil Well Supply Company at Taft, California, that it was privileged to deliver to the Cleveland Oil Company supplies to the amount of \$1500.00, but nothing in excess of that amount without communicating with the Los Angeles office. And in that letter the treasurer said:

“They are owing us considerable money, and they have not acquired the habit of discounting their bills, which is our reason for the limited credit.” [Tr. p. 130.]

On January 21, 1910, the treasurer notified the Oil Well Supply Company at Bakersfield that the amount of the open account of the Cleveland Oil Company was \$4819.50, and they owed a note due February 28th for \$2055.42, and one due February 15th for \$6617.16, and that they felt this was quite enough, providing the information which was given them by their district manager at Bakersfield, the other day, was correct. That they were owing considerable sums for other bills, and there were other creditors who were not able to get their money. This letter also required a report from each of the representatives of the company in his district, and permitted them to make deliveries amounting to \$1,000.00 for all three stores. [Tr. p. 132.]

From that time on there was more or less correspondence between the claimant and the stores concerning the amount of credit which was to be given to the bankrupt, and commenting upon the trouble of obtaining payments from bankrupt. At the last of August the credit of the bankrupt was practically suspended, and from that time on the total amount of the sales of the claimant to the bankrupt did not exceed the sum of \$100.00, whereas prior to that time the sales had amounted to thousands of dollars.

Mr. Sands, the credit man, gave as an explanation of this that the account of the bankrupt was becoming too large, and was larger than the amount of credit usually given to oil companies by his concern, but it

does not appear from the letters in evidence that this was the case. The claimant did not seem to be concerned as much over the amount of the indebtedness owing to it as it did over the fact that it could not obtain any payments on account from said bankrupt. On the 21st day of September, 1910, the claimant notified several stores at Bakersfield, Taft and Maricopa, in Kern county, that the bankrupt was only privileged to buy supplies for emergency requirements not to exceed \$50.00 in any one order, and that if the bankrupt required anything in excess of that amount that it was to be communicated to the Los Angeles office, where the claimant maintained a credit man. Prior to that, on July 22, the managers of the stores were advised that the state of the account of the Cleveland Oil Company was such that they were only to deliver goods to the Cleveland Oil Company in small quantities not to exceed \$100.00, and anything in excess of that amount was to be referred to the Los Angeles office.

On August 6th the claimant authorized its agents to deliver to the bankrupt 11,000 feet of #28 casing, stating that the reason therefor was that the bankrupt had promised to pay its equivalent in cash. [Tr. p. 136.]

On the 22nd day of August, 1910, the claimant was advised that the refinery of the Warren Brothers, which was operated for the benefit of the Cleveland Oil Company, was destroyed by fire, and the secretary of the claimant wrote to Mr. Sands as follows:

“Had a talk with Mr. Batchelder of the Cleveland Oil Company this morning. It seems that their refinery in the Kern River field burned down Saturday

and they are having trouble in raising the \$1700.00 necessary for the 1000 feet of 8" casing for the Kern River field. It seems that the National sent them a car of 8¼" to the Midway field, and by mistake their superintendent unloaded it and hauled it out. You know we gave them 1000 feet there and the result is that they have 2000 feet too much in the Midway field, and have none in the Kern River field. They have not taken care of their note due today. We are simply giving you this information that you may be in touch with the matter."

Mr. Sands endorsed on this letter a most singular notation, to-wit:

"Keep after them at least twice a day. Make them come through."

Although Mr. Sands reiterated time and time again in his testimony that he felt that this account was perfectly safe and that the Cleveland Oil Company had sufficient assets to pay all of its debts, he must at that time have had some reasonable notice to have put him on inquiry as to their true condition, for such a statement would hardly come from a credit man who felt assured that his firm's account was perfectly good.

Mr. Sands, the credit man of the claimant, testified that he did not at any time make an investigation of the financial condition of the bankrupt, but we are of the opinion that he was at the time these payments were made, acquainted with the true condition of the company, for on the 18th day of October, 1910, he wrote to his district manager at Taft as follows:

"The Cleveland Oil Company owes us considerable money and they are not in position to supply the ready cash. Their stock is almost worthless from a stock market view, the last sale being passed at two and three-fourths cents. They are endeavoring to arrange



the company on a good financial basis, but that will take some time. They have arranged to deliver us a string of ten #40 casing on the well they are drilling in the Midlands, and we have promised to give them credit when delivered to our stock at Moron at list less 25%."

The statements in this letter to the effect that "they are endeavoring to arrange the company on a good financial basis, but that will take some time," and the statement that "their stock is almost worthless," would certainly lead to the conclusion that Mr. Sands had considerable information regarding the financial condition of the Cleveland Oil Company previous to the time that letter was written.

The claimant during the last part of August and the first part of September was pressing the Cleveland Oil Company for payment of account, and being unable to obtain the same Mr. Sands informed Edson France that he was going to try to collect the account from his brother, W. A. France, who had personally guaranteed the account of the Cleveland Oil Company. It was during this conversation with Mr. Sands that Edson France informed Mr. Sands that the company did not have any money in the treasury at the time, and that the production had not brought in enough to pay him or the pay roll and other expenses. [Tr. p. 41.] Just prior to the time of the payment made on September 31, 1910, Mr. Sands called at the office of the claimant to explain to the claimant why the Cleveland Oil Company did not pay some of the money that it had demanded. [Tr. p. 37.] At that time Mr. France informed Mr. Sands that the company did not have any

money. [Tr. p. 37, Tr. p. 30.] And that the company could not make a payment on account [Tr. p. 31], and he told him that they had some pipe in the oil fields which he would turn over to him if he would take the same [Tr. p. 37], and he further stated to Mr. Sands that they would have to take the casing, as the company did not have any cash on hand. [Tr. p. 32.] Mr. Sands agreed to accept the casing and gave the company credit for the same less 25% of the cost thereof. As the result thereof sufficient casing was returned to claimant to entitle the bankrupt to a credit of \$2000.00 under the agreement. At this time other creditors were after their money, but the bankrupt did not make a similar offer to them. [Tr. p. 39.]

At the time the \$2000.00 cash payment was made the bankrupt had been promising the claimant cash for several weeks. The notes of the claimant on which said \$2000.00 was credited had been endorsed and discounted by the claimant at its bank. They were not paid when due, and claimant had to take up the notes at the bank, and they were advised that the Cleveland Oil Company did not have the money at that time to protect the note.

Claimant's contention that on the 31st day of December, 1910, when the pumps were returned to it by the bankrupt, that it did not have any knowledge which would lead them to suspect that the Cleveland Oil Company was insolvent or that they were receiving a preference over other creditors, or that they did not have knowledge of any facts which would put an ordinary prudent man upon inquiry as to the real condition of said Cleveland Oil Company, is wholly without merit.

For prior to the 31st day of December, 1910, in addition to the information mentioned above, the claimant had among its files in its credit department certain clippings from Los Angeles newspapers which recited the fact that the Cleveland Oil Company was in a bad way financially, and that its officers were under arrest by the United States postal authorities on account of fraudulent transactions connected with the company. [Supp. Tr. p. 35.]

It is probably true that the claimant, being satisfied with the guarantee which it had received from W. A. France, the president of the company, and who they believed to be financially responsible, was not as diligent in investigating the affairs of the company as they otherwise would have been, but this certainly could not relieve them from the duty of making a reasonably diligent inquiry, which, if made, would have disclosed to them that at the time the payments were made the Cleveland Oil Company was insolvent, and that by receiving said payments they were receiving a preference over other creditors. The referee in bankruptcy and the learned district judge were satisfied that the facts disclosed by the evidence were such as to have put a person of ordinary business intelligence on inquiry, and to induce the belief that it was given more than other similar creditors.

It is not necessary that the claimant should have had knowledge that a preference was intended, nor was it necessary that the claimant should believe that a preference was intended. It was only necessary that the claimant should have had a reasonable cause to believe that a preference was intended, which is far different.

The doctrine as laid down by the federal courts in construing this element of preference is that notice of any facts that would incite a man of ordinary prudence to inquiry under similar circumstances is proof of all the facts which a reasonably diligent inquiry would disclose.

*In re Eggert*, 102 Fed. 735;

*Stuart v. Farmers-Merchants Bank of Cuba City (Wis.)*, 21 Am. B. R. 403;

*Grant v. Bank*, 97 U. S. 80;

*Bank v. Cooke*, 95 U. S. 343;

*McElvian v. Hardesty*, 22 Am. B. R. 320, 169 Fed. 31;

*Wright v. Sampter*, 18 Am. B. R. 355, 152 Fed. 196;

*Wright v. Skinner Manufacturing Co.*, 20 Am. B. R. 527, 162 Fed. 315;

*In re Goodhile*, 130 Fed. 471;

*Sundheim v. Ridge Avenue Bank*, 15 Am. B. R. 132;

*In re Virginia Hardwood Mfg. Co.*, 15 Am. B. R. 135;

*In re Dorr*, 196 Fed. 292;

*Collier on Bankruptcy*, 9th Ed. 815, and cases cited;

*Coder v. McPherson*, 18 Am. B. R. 523, 152 Fed. 951;

*Huttig Mfg. Co. v. Edwards*, 20 Am. B. R. 349, 160 Fed. 619;

*Rogers v. Fidelity Savings Bank & Loan Company*, 23 Am. B. R. 1, 172 Fed. 735;

*In re Harrison Bros.*, 202 Fed. 243.

*In re Dutschle*, 25 Am. B. R. 348, 182 Fed. 435, it appeared that within four months prior to the bankruptcy payments had been made on notes for a lumber account which had frequently gone to protest and had been the subject of constant complaint. Notwithstanding this fact, the claimants had an order for more lumber and were about to fill it when they learned that the bankrupts were in difficulty, and did not do so. They were also advised on inquiry at the bank where the bankrupts were in business that their condition had improved and it was thought that they would pull through. It was held that the facts in this case concerning the critical embarrassment of the bankrupts were sufficient to have put the claimants on inquiry, and that their claim for a balance due on the notes could not be allowed unless they surrendered the payments received during the four months' period which constituted voidable preferences.

*In re Dorr*, 196 Fed. 292, C. C. A. 9th Circuit, decided by this court May 6, 1912, it was held that the fact that the bankrupt gave to the claimant a check for \$26,000, telling him that there was no funds in the bank to meet it, and not to cash it until the next day, and the fact that the claimant was anxious for the payment of his debt, and that the claimant was several days in securing his money, were such facts as would put a reasonably diligent man upon inquiry as to the financial condition of the bankrupt. The circumstances in this case surrounding the transactions between the claimant and the bankrupt as to putting the claimant upon notice are far stronger than those in the Dorr case. In the



present case the credit man of the claimant was informed that the company had no money with which to pay its obligation, that its production was not sufficient to meet its small bills; that if the claimant expected anything on account it would be necessary for them to take property belonging to the bankrupt and credit it on account. Furthermore, the claimant was aware of the fact that the stock of the bankrupt had declined until it was worthless, and of no market value, and that the financial condition of the company was precarious. It also was aware that there was other small creditors who were unable to obtain payment from the bankrupt. Under the rulings in the above cases and under the rule of law as laid down by the federal court, that the appellate court will not disturb the findings of fact of the referee and the district court when the same are made on conflicting evidence, this court would hardly be justified in finding that the evidence in this case was insufficient to constitute the payments made preferences.

WHERE THERE IS A CONFLICT OF TESTIMONY, THE APPELLATE COURT WILL NOT REVERSE THE DECISION OF THE LOWER COURT.

In this case there is a substantial conflict of evidence. On one side we have the circumstances surrounding the preferential payments showing that at the time they were made that the claimant was informed that the bankrupt had no money and that the only payment that the bankrupt could make was to return certain casing and pumps which it had on hand, and prior to the time of said payments that the credit of the bankrupt with

the claimant had been entirely cut off and that the claimant had been insisting and demanding its money from the bankrupt, and had threatened to make the surety of said bankrupt pay the same, and that it had refused to deliver any goods in any amount to said bankrupt without immediate cash payment for the same, together with the correspondence of Mr. Sands, the credit man for the claimant, with the various stores of claimant showing that Mr. Sands was acquainted with the financial irresponsibility of the bankrupt. On the other hand we have the testimony of Mr. Sands to the effect that he at all times considered said account a solvent one, and that he did not have the least suspicion that at the time he received said payments that the bankrupt was insolvent or that his firm was receiving a preference. The referee and the district court decided that each of these payments was a preference after hearing and considering all of this testimony; and this being the case, the appellate court should be very reluctant to reverse the decision of the referee and the United States court where the referee had the opportunity to personally observe the witness and to take into consideration their attitude while testifying. In such cases it has been repeatedly held that the appellate court will not disturb findings of fact made by the referee and district court on conflicting evidence. In the case of *Boswell National Bank v. Simmons*, U. S. Circuit Court of Appeals for the Eighth Circuit, Judge Adams said:

“When the trial court has considered conflicting evidence and made its findings of fact, they must be taken to be presumably correct, and this presumption is ma-

terially strengthened by the master's prior findings to the same effect."

Concluding, after a careful consideration of the proof in this case, that there was substantial evidence to sustain the findings of fact, and discovering no obvious errors of law or serious mistake of law in such findings, the presumption of their correctness must be indulged.

Boswell National Bank v. Simmons, 26 Am. B. R. 865.

In the case of Page v. Rogers, 211 U. S. 575, the Supreme Court had an opportunity to discuss this proposition in a preference case, and used the following language:

"The rule is well established that where two courts have concurred in the findings of fact in a suit in equity, this court will accept these findings unless clear error is shown."

In Cenner v. Webster-Tapper Co., 168 Fed. 519, Judge Loland, in discussing a preference case, cited the case of Page v. Rogers, and said:

"We conceive no error in the findings of fact made by the referee and confirmed by the judge. These we are to accept, unless error in them is shown."

*In re Dorr*, 196 Fed. 292, the rule in a preference case was laid down as follows:

"Where the testimony is conflicting and the findings of fact of the referee and district judge are the same, the facts will not be inquired into by an appellate court unless there is plain error."

In *De Laval Separator Co. v. Iowa Dairy Separator Co.*, 194 Fed. 423, Judge Sanborn, speaking for the court, said:

“When the chancellor has considered conflicting evidence and made his findings and decree thereon, they must be taken to be presumably right, and unless an obvious error has intervened in the application of the law or some serious mistake has been made in the consideration of the evidence, they must be permitted to stand.”

In the case of *Vanderbilt v. Bishop*, 199 Fed. 420, Judge Ross, speaking for the court, said:

“In the circumstances appearing, the general rule applicable to such cases precludes us from interfering with the findings of the trial court, having the advantages alluded to.”

In conclusion, we wish to call attention of the court to the opinion of the learned referee, in which both the law and the facts of this case are discussed at length with unusual clearness and perspicuity. [Tr. pp. 9 to 23, inclusive.]

It is respectfully submitted that the judgment of the United States District Court should be affirmed.

HICKCOX & CRENSHAW,

*Attorneys for William H. Moore, Jr., Trustee in Bankruptcy of the Cleveland Oil Company, Bankrupt, Appellee.*





In the United States  
Circuit Court of Appeals  
For the Ninth Circuit

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R. H. HERRON COMPANY, a corporation,

Appellant,

vs.

WILLIAM H. MOORE JR., Trustee in  
Bankruptcy of the Cleveland Oil Com-  
pany, a corporation,

Appellee.

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**REPLY BRIEF OF THE R. H. HERRON COM-  
PANY, CLAIMANT AND APPELLANT.**

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**RESPONDENT HAS FAILED TO SHOW THAT  
THE PAYMENTS CONSTITUTED  
PREFERENCES.**

Counsel in their reply brief first assert that the findings of the Referee to the effect that at the time the payments were made was insolvent was sufficiently supported by the evidence. After a review of the testimony they say (page 7) "It can hardly "be contended that these assets out of which the

“trustee did not realize in excess of \$10,000.00  
“were at any time during the four months of sufficient value to pay the unsecured indebtedness of  
“the company amounting to over \$57,000.00.”

It may be remarked here that the unsecured debts did not amount to \$57,000.00 and over, but according to the schedule in insolvency were \$34,234.61 (Supp. Tr. p. 18). This is the amount stated by the Referee as the unsecured indebtedness (Tr. p. 10). In fact counsel in their brief place it at this sum (p. 6 Respondent's Brief).

To support this conclusion they say that the property which came into the hands of the trustee being property held by the bankrupt at the time of the filing of the petition did not exceed the sum of \$10,000.00; that both France and Batchelder testify there was no change in the assets of the company at the time of the bankruptcy; that the leases were of very doubtful value and were forfeited to the lessors.

In reply appellant contends that counsel for the respondent are drawing their conclusion from the facts that appeared at the time of the insolvency some months later and not by those that are in evidence as of the dates of the transactions attacked. At the time of the alleged preferences the insolvent company had valuable leases. These are ignored entirely by counsel or are dismissed with the statement that they were of very doubtful value. It is not denied by respondent that at the time of the alleged preferences the insolvent was in possession of and the owner of these leases. That they were

not of very doubtful value is shown by the testimony of witnesses called by the trustee himself.

Mushet, our expert accountant, who made an examination of the books and made a report after the date of the alleged preferences, reported as among the assets "oil properties and leases \$253,163.05" and "development work in different companies \$172,852.35" (Tr. p. 57).

This would certainly indicate that the leases were not valueless or of very doubtful value at the time of the payments. The fact that they were afterwards forfeited and became of no value as assets to the bankrupt is not a proper subject for consideration here.

Furthermore, Sands testified that at "this particular time this company had a lease on what was "and is considered a very valuable piece of oil territory, as I understand it in the Midway field" (Tr. p. 72).

He further said (p. 94) "It was adjoining the "Buick Oil Company property, which is one of the "best properties, we understand, in the state; it "joined that."

It also appears that on December 20, 1910, the New York Midway Oil Company was trying to arrange to take over the property. The secretary of this company at that date wrote, among other things, as follows (Tr. p. 146):

"It is the intention of the New York Midway Oil Company to settle with all these creditors, to adjudge all matters now in litigation and to save to the individuals who are stockholders of the Cleve-

“land Oil Company the equity they now have in “the property.”

This is significant in view of the claim that the leases were of very doubtful value. It is hardly to be supposed that the new company would settle with all the creditors, would adjust all the matters in litigation and save the equities to the stockholders if the leases were of no value.

The record also shows that the trustee contested the forfeiture of one of the leases very vigorously (Tr. p. 52). Certainly this would indicate that the trustee regarded the lease as valuable. He would hardly contest the forfeiture vigorously if he considered the lease as valueless.

It also appears that the property covered by this lease was afterwards leased to and was being pumped and operated by the Midway Field Company (Tr. p. 52). This too shows the lease was valuable for it is not customary for an oil company to lease, pump and operate property unless it is valuable, unless it pays them to do so. Especially is this so where a company leased property after it has been leased to and operated by another company. For if the operation of the property by the first company had shown it to be without value no other company would ever lease it.

The fact that afterwards the leases were forfeited and went back to the owners and therefore did not add to the distributable assets of the Cleveland Oil Company is not a proper matter of consideration in determining the rights of the plaintiff. One of the leases the trustee let go by default; another he

lost on a contest (Tr. p. 52). These are facts occurring afterwards and therefore have no weight. The controlling fact is that at the times of these payments the Cleveland Oil Company was in possession of these leases. They were of value. This is shown by the report of the expert Mushet. It is shown by the attempt of the New York Midway Oil Company to take over the property, pay all the debts, protect the stockholders and reorganize the company. It is shown by the fact that some of the property was afterwards leased to and was being pumped and operated by another company. It is shown too by the acts of the trustee himself in vigorously contesting the forfeiture of the lease.

It follows that the claim of counsel for the respondent that the assets during the four months' period were not enough to pay the unsecured indebtedness—\$34,234.61—is not supported by the evidence.

If through the precipitancy of creditors and the default or misfortune of the trustee the assets which the company had at the time of the payments were subsequently lost, this does not affect the validity of the payments to the claimant and should not be given the slightest consideration.

Continuing counsel say (p. 8) that "at the time the payments were made, the bankrupt by the testimony of its officers, Edson France and W.J. Batchelder, not only knew that it was insolvent but knew it was irretrievably so, and that it could not make the payments that it did without disparity in payments to its other creditors."



They do not refer to any evidence in the transcript to support this statement. Certainly so sweeping an assertion should be based upon very positive testimony.

The testimony of Batchelder is on pages 115-119 of the transcript. An examination of it does not show in any particular that he knew the company was irretrievably insolvent. There is not a syllable of his testimony to show that he had any knowledge of the financial condition of the company at all. On the contrary he says that he did not handle the accounts, but that the treasurer, Edson France, had charge of the accounts and conducted most of the negotiations (Tr. p. 118).

Edson France directly testified that at this time he did not consider the company in very bad shape financially (Tr. p. 38).

As counsel rely upon these two witnesses to support this statement, the foregoing references show that the assertion made by them is without any support whatever.

Counsel say that the trustee was at a great disadvantage in this case for the reason that the parties were very reluctant and unwilling to give the court the information which they possessed; that because of this the trustee was unable to present to the court a full and complete statement of the transactions between the claimant and the bankrupt.

They say that Mr. Sands was a reluctant and an unwilling witness as he was one of the officers of the claimant and very desirous that his company's claim should be allowed. They say further that Mr.

France and Mr. Batchelder were reluctant and unwilling witnesses as they were under arrest by the United States postal authorities on account of transactions connected with the Cleveland Oil Company.

Mr. Sands, Mr. France and Mr. Batchelder were all witnesses called by the trustee. They were his witnesses and not the plaintiff's. This counsel are attacking the fairness, integrity and character of their own witnesses.

If the insinuations of counsel are based on the truth, they being trustee's witnesses and the ones upon whose testimony the trustee relies to establish the alleged preferences, it may be asserted that the trustee has failed to sustain the burden of proof cast upon him. If his witnesses are unworthy of belief, he can hardly expect to prove his case by them. As to the statement that Mr. France and Mr. Batchelder were under arrest by the United States postal authorities on account of transactions connected with the Cleveland Oil Company, there is nothing in the record to support it. This fact nowhere appears in the transcript. Thus counsel have gone entirely outside of the record to attack their own witnesses.

But suppose counsel's charges and insinuations were true—which is not admitted by appellant—that does not justify the statement that the trustee was at a great disadvantage in this case. If, as he claims, the company was so irretrievably bankrupt at the time and its affairs were such that an inquiry would have put the plaintiff on notice, these facts could have been proved by other evidence. He

could have introduced the evidence of other creditors and of bankers and have shown the general reputation of the company in the community. He failed to do so. The burden of proof is on the trustee. If his proof is insufficient, his case falls. But under no circumstances should he be permitted to sustain his case by attacking the credibility and character of his own witnesses.

Counsel next refer to the fact that the plaintiff here was suspicious and had cut off the credit of the Cleveland Oil Company as showing that it had reasonable cause. They say that as early as January 11, 1910, the plaintiff had become suspicious and that on January 21, 1910, the treasurer of the claimant wrote that the credit given the Cleveland Oil Company was quite enough as it was owing considerable sums for other bills and other creditors were not able to get their money.

These events were months before the transactions here attacked. That the claimant here acted in entire good faith is shown by the fact that subsequently it sold to the Cleveland Oil Company thousands of dollars worth of goods. It has been shown in the opening brief that the credit of the company was never entirely cut off; that the company was privileged to call at their stores at Bakersfield, Taft and Maricopa for emergency supplies and that for anything in excess it was to communicate with the Los Angeles office (Opening Brief pp. 23 and 24).

There is not a line in the transcript to show that the credit was curtailed because of a belief in the

company's insolvency. Mr. Sands testifying as to this says (Tr. p. 70):

There was nothing new in curtailing the credit of the oil company. It was in accordance with their customary treatment of the company. As early as May, 1909, its credit was curtailed (Tr. p. 100). There was therefore nothing at all significant in limiting its credit in July, 1910.

"We considered at that time they were owing us "quite a considerable sum and of course like other "creditors they reached the period where they "should either increase or decrease. At that time we "thought we had given them—that they were up "to the limit of their credit."

This is a simple and perfectly natural explanation from the lips of the trustee's own witness.

Under any circumstances mere suspicion, cutting off of credit, being anxious about the payment of bills or being importunate in their collection does not establish reasonable cause. If they did the business transactions of a community would be very insecure. Payments are made to creditors up to the very day of their failures in entire good faith by creditors who are buoyed up by the hope that they may be able to proceed in business. If mere suspicion were enough to upset a transaction, then few if any acts could stand because any transaction in any degree out of the ordinary is liable to cause suspicion.

That the contention of appellant in this regard is abundantly supported by the authorities is shown by the citations in the opening brief. Attention

is again called to them and particularly to the leading case of Grant National Bank, 97 U. S. 80, quoted at length on pages 17 to 20 of the opening brief. The clear reasoning of this great case applies directly here and fully shows the fallacy of the position taken by counsel.

Counsel next refers to two letters, one written to Mr. Sands on August 22, 1910, the other written by Mr. Sands on October 18, 1910. The first letter discloses nothing suspicious or out of the ordinary but on it Mr. Sands indorsed the following notation: "Keep after them at least twice a day. Make "them come through."

This notation is referred to by the referee and counsel also say that Mr. Sands must have had reasonable cause or otherwise he would not have made such a notation. They further say that they are of opinion Mr. Sands was acquainted with the true condition of affairs because of the letter of October 18, 1910.

It is respectfully submitted that a careful consideration of these letters and of the actions of Mr. Sands taken in connection with them shows that the conclusions of counsel are not justified.

There being some question as to the meaning of Mr. Sands in making the above notation, his actions in reference thereto will throw a strong light upon it. It is well settled that in case of writings that are uncertain, the practical construction placed upon them by the parties themselves and their actions under them are the surest means of ascertaining what was meant. Applying this rule here



and it becomes evident that Mr. Sands meant nothing by the annotation and that he had no suspicion that a preference was intended.

It appears he never went after them twice a day or once a day or at all except in the manner he had always acted. The notation was a mere memorandum addressed to himself. He never communicated it to any, never instructed any one to go after the Cleveland Oil Company. While he wrote to his agents afterwards he never told them to go after the company and never expressed any doubt as to getting the money due his company. Furthermore the notation says "Make them come through." This is as much as to say that the company could come through, had ability to do so if payment was urged. There is no suggestion that it was necessary to go after the company for fear that there was not enough for all the creditors and that the plaintiff might be overreached by the other creditors if it did not keep after the debtor.

The same general conclusions may be reached as to the other letter. In this Mr. Sands says: "The 'Cleveland Oil Company owes us considerable 'money and they are not in a position to supply 'the ready cash. Their stock is almost worthless 'from a stock market point of view, the last sales 'being passed at 2 $\frac{3}{4}$ c. They are endeavoring to 'arrange the company on a sound financial basis 'but that will take some time." (Supp. Tr. p. 37).

Here is not a suspicion of insolvency, not a suggestion that the company will not be able to arrange its affairs on a sound financial basis. The statement

“that will take some time,” is equivalent to saying it will be accomplished and can be done, only it will take time. For this reason—that it would take time—and not because the plaintiff suspected insolvency or had reasonable cause to believe a preference was intended, the letter was written by Mr. Sands to his manager informing him why he would accept the pipe and credit the debtor with it. He was explaining to his manager why he was taking the pipe and was directing the manager what to do with it. There is not the slightest intimation in the letter that there was any thought of the insolvency of the debtor, that there was any idea that other creditors were being taken advantage of or that any preference was intended.

This it is respectfully submitted is the only proper construction to be placed upon this letter. These letters have been considered at some length in the opening brief on pages 31 to 34. It is unnecessary to repeat what is there said. But appellant herein respectfully urges that its construction of these letters is correct and that its conclusions are fortified by the practical interpretation placed upon them by the parties themselves.

Counsel next refer to the return of the pipe. They have not however given all of the testimony concerning this particular transaction. It seems that the return of the property was due to a voluntary suggestion on the part of France (Tr. p. 39). France stated to Sands that his company had a string of pipe in the field it was not using (Tr. p. 44). This was the pipe that was returned. It was quite cus-

tomary to take back second hand material (Tr. p. 85). The price at which it was taken was more than a fair price (Tr. p. 85). France told Sands that he had no use for the material and would be very glad if it could be received on account as a credit. (Tr. p. 86).

The complete transaction shows that it was entirely free from suspicion and in absolute good faith with no thought of the insolvency of the debtor or idea of getting ahead of the other creditors. A full account of it is given in the opening brief pp. 27 and 28, and it is respectfully contended that when all the facts are considered, it is not open to attack as a preference.

Counsel next refer to the payment of the \$2000.00 but make no argument upon it. This matter is fully explained in the opening brief pages 28 and 29 and what is said there is practically uncontradicted.

Counsel then urge that the claimant's contention that on the 31st day of December, when the pumps were returned it did not have knowledge is wholly without merit.

In this connection they say that the claimant had among its files in its credit department certain clippings from Los Angeles newspapers which recited the fact that the Cleveland Oil Company was in a bad way financially and that its officers were under arrest by the United States postal authorities on account of fraudulent transactions connected with the company.

Concerning this, it may be said that Mr. Sands

said he never read the articles in the newspapers (Tr. pp. 65, 66) and Mr. Sands, it is to be remembered, was a witness for the plaintiff and was testifying on direct examination in giving this testimony. He furthermore says that he had no knowledge as to the clippings; that he did not take the papers from which they were cut and that the clippings must have been cut out by some one who took the paper (Tr. pp. 62, 63). Thus the testimony of the plaintiff's own witness on direct examination disposes of his contention in this regard.

Counsel then urge the rule that notice of any facts that would incite a man of ordinary prudence to inquiry under similar circumstances is proof of all the facts which a reasonably diligent inquiry would disclose.

This rule as an abstract proposition is one which no one will deny. Appellant, however, contends that it has no application here. The facts introduced in evidence here, even if the instruction most favorable to the trustee is placed upon them create nothing more than mere suspicion. It has been abundantly shown in the opening brief that mere suspicion, the curtailing of credit and other steps taken by a creditor to protect itself do not constitute reasonable cause. If they did then no transaction within four months of bankruptcy proceedings would ever stand.

Again even if the appellant here were put upon notice—which is strenuously denied on the showing made in the opening brief—there is nothing in this record to show that he would have learned any-

thing by inquiring. The case here is made up entirely of the dealings between the parties to the transactions here attacked. There is no evidence whatever as to the dealings of the Cleveland Oil Company with third persons as to its general reputation in the community, the number of its other creditors, as to its standing with banks and as to the other various matters which go to show the standing of a business house in a community. There is no evidence to show any of these matters. The trustee has shown nothing which would be developed were an inquiry made. One of the limitations of the rule of notice relied upon is that upon inquiry being made the information would have been obtained. There is nothing in this record to show that upon inquiry any information would have been obtained. The trustee here has contented himself with merely showing the relations between the plaintiff and bankrupt. Had the outside relations of the Cleveland Oil Company been shown there might have been something upon which the rule could operate but not having shown anything, it is pure abstraction as far as this case is concerned. This point has been fully argued in the opening brief on pages 63 to 66 and it is respectfully urged that respondent has not met the contentions there made. Appellant then stated that there was nothing in the record to show that an inquiry would have developed anything or in any way charged the appellant with knowledge. Counsel in reply merely refer to the dealings between the plaintiff here and the Cleveland Oil Company. It



is therefore submitted that the contention of appellant that the rule of notice does not apply here as there is nothing in the record upon which it could operate is admitted.

The authorities cited by counsel are not in point.

In *in re Dorr*, 196 Fed. 292, the facts in the record were such that an inquiry by the creditor would have disclosed the information as to the condition of the insolvent (See page 296).

The same is true in the other case cited by counsel on this point, the case of *in re Deutschle*, 182 Fed. 435. In this case the facts which would have been elicited are abundant. The court does, however, in the course of the opinion use language that applies strongly here. In speaking of the effect of not paying notes and frequently allowing them to go to protest as giving a creditor notice, Archibald, D. J. said (p. 437):

“This is not enough. It shows a lack of ready “money, no doubt, and possible embarrassment “but not necessarily insolvency, and was not, therefore, of itself sufficient to put the claimant on inquiry.”

As has been pointed out, the only thing in this whole record to charge the plaintiff was that the Cleveland Oil Company was short of ready cash. It had valuable assets in its leases but it had difficulty in raising the ready money. This is the case of thousands who carry their ventures to successful conclusions. The relations between the parties had not materially changed from the beginning. As early as May, 1909, the credit of the oil company

had been curtailed (Tr. p. 100). Yet after that the plaintiff had sold it thousands of dollars worth of goods without any thought or suspicion of its insolvency. France, the president of the company, was hopeful to the end and believed the company would succeed. Towards the end, a reorganization plan was under way which would probably have straightened out everything and in all likelihood it would have succeeded but for the bankruptcy proceedings.

It is respectfully urged that counsel have failed to show anything justifying the application of the doctrine of notice and that therefore they are not at liberty to invoke it in this case.

THE RULE THAT "WHERE THERE IS A CONFLICT OF TESTIMONY, THE APPELLATE COURT WILL NOT REVERSE THE DECISION OF THE LOWER COURT" DOES NOT APPLY HERE.

The learned counsel attempt to invoke the rule that where there is a conflict of testimony the Appellate Court will not reverse the decision of the lower court. This is an old rule of procedure and one that has been enunciated by most if not all appellate tribunals. It is, however, a discretionary rule, it always yields when the proper administration of justice demands it and it is as frequently departed from as observed. In reply to the contention of counsel, it is sufficient to refer to the numerous authorities cited and quoted in the opening brief where the Appellate Courts have gone into the evidence and reviewed it for the purpose of determining

whether the facts in the particular case before it constituted a preference. These authorities abundantly show that the rule contended for is far from being an absolute one and that it is never applied where the rights of the parties require an examination into the record.

Were, however, the rule as absolute as the learned counsel would have it, it would not apply here. The rule is invoked where the witnesses on one side contradict the witnesses on the other side of a case. In this case the witnesses were all on one side. The claimant here called no witnesses. The only witnesses called were those called by the trustee. Therefore the respondent stands in the anomalous position of trying to apply this rule because of the conflicting statements of his own witnesses. The only conflict counsel points out is the alleged contradictory statements of Sands himself. Sands was the respondent's witness. Now counsel urges this court not to consider the appeal on the ground that their own witnesses contradict one another.

It is submitted that so unusual and remarkable a position cannot be maintained. On the contrary, if there is such a conflict of testimony among the witnesses for the trustee, it clearly shows that the respondent here has not sustained the burden of proof which the law imposes upon it.

#### CONCLUSION.

Appellant in its briefs has gone fully into the evidence as well as the law, feeling that an injustice has been done to it. A careful examination of the record, of the acts of the appellant and of the letters

written by the agents fails to show the appellant had any reasonable cause to believe a preference was intended. There is nothing to show that the appellant had at any time any suspicion of the insolvency of the Cleveland Oil Company. There is nothing to show that at any time it was attempting to overreach any of the other creditors. All of its acts at all times were in the utmost good faith, open and above board and free from all doubt. It is very questionable if the oil company was insolvent at the time of the alleged preferences. It had at that time valuable leases. Afterwards when the creditors precipitated the bankruptcy proceedings and the leases were lost or forfeited, the assets of course were dissipated. But the rights of the appellant here are to be determined by what existed at the time of the alleged preferences. At that time, the company apparently was solvent. One of the reasons for the adverse view taken of the appellant's case has arisen out of confusing the facts existing at the time of the bankruptcy with those that existed at the time of the payments. If only the facts that are in evidence as of the date of the payments are considered and all others are eliminated, it is respectfully submitted that the case will become clear and it will fully appear that there was no reasonable cause to believe a preference was intended.

For the foregoing reasons it is respectfully submitted that the judgment of the United States District Court be reversed,

Respectfully submitted,

GEO. E. WHITAKER,  
Attorney for Appellant.

















